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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. [redacted] 92.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, APPELLANT,

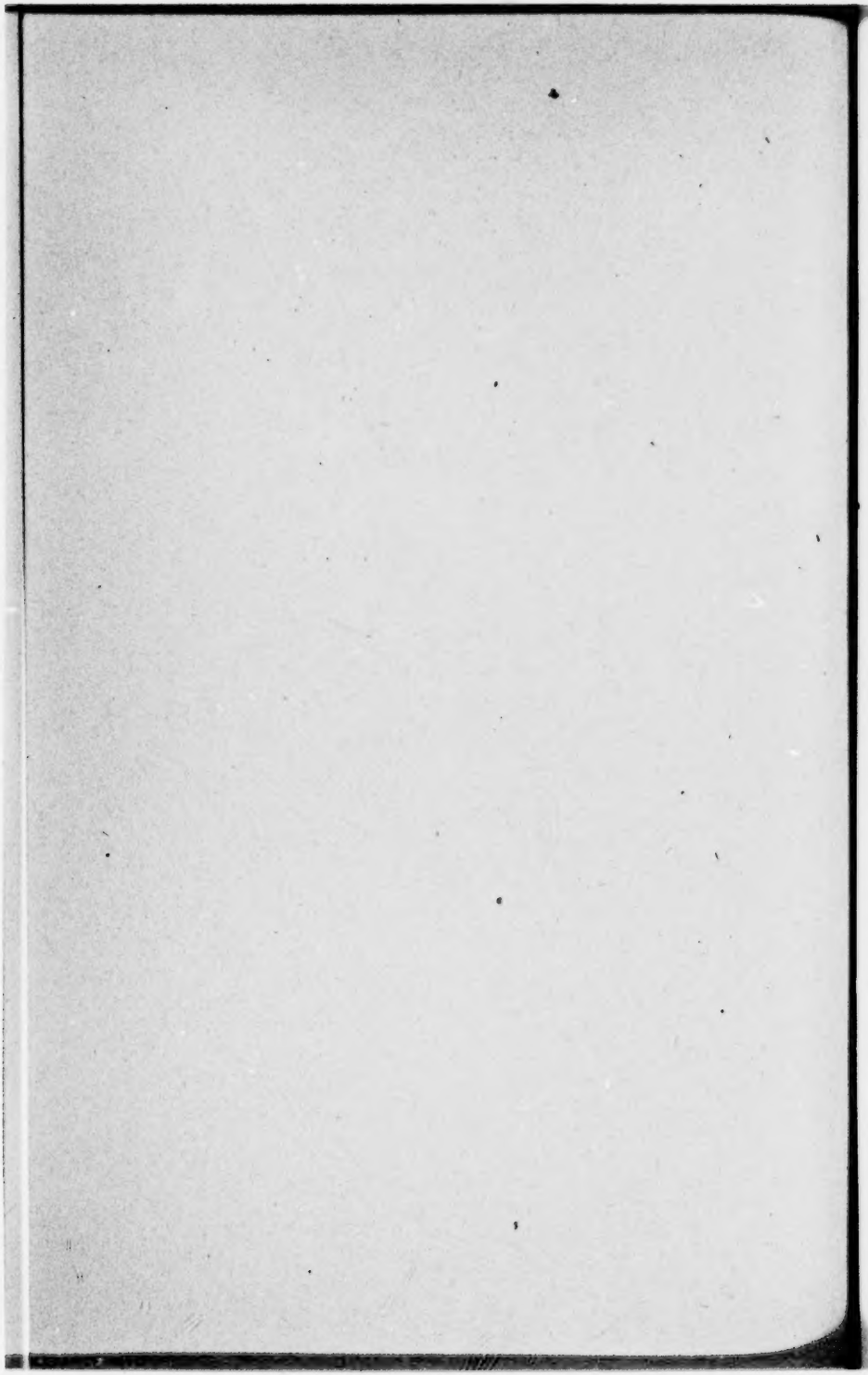
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 3, 1908.

(21,054.)



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OCTOBER TERM, 1908.

No. 306

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, APPELLANT,

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 11, 1909.

1 I.—*Petition and Amended Petition.*

In the Court of Claims.

No. 22535.

THE WILLIAM CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY
vs.
THE UNITED STATES.

The claimant filed its original petition April 29, 1901, and subsequently, to wit, on March 13, 1903, by leave of Court, and in lieu of said original petition, it filed its amended petition which is as follows.

2 No. 22535.

THE WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY, Claimant,
v.
THE UNITED STATES.

Amended Petition and Exhibits A, B, & C.

[Filed March 13, 1903.]

To the Honorable Chief Justice and Judges of the Court of Claims of the United States:

The claimant, The William Cramp & Sons Ship & Engine Building Company, a corporation incorporated under the laws of the State of Pennsylvania, respectfully shows:

1. On or about September 24, 1896, the claimant and the United States, represented by the Acting Secretary of the Navy, entered into a contract, a copy of which is hereunto annexed, marked Exhibit A, and made part hereof, whereby it was, among other things, agreed:

That the claimant would, in accordance with certain laws, plans and specifications, construct for the United States a certain vessel designated as "Battleship No. 8," with her fittings as specified and certain of her equipment; such vessel to be constructed with her machinery engines and boilers complete in all their parts and
3 appurtenances, and delivered at the Navy Yard, League Island, Pennsylvania, to such person as the Secretary of the Navy might designate, within three years from the date of the contract, to wit: on or before September 24, 1899. That the claimant would, in accordance with the said specifications and plans, furnish all of the material to be used in the construction of the hull and machinery of the said vessel. That the claimant would, as rapidly as possible, furnish all working drawings and templates necessary to

show the dimensions and shape of each and every armor plate required for the construction of the said vessel, including those to be provided for her side and diagonal armor, turrets, barbettes, casemates, conning towers, ammunition tubes and the protections for her guns and loading positions, such drawings and templates to show the positions and sizes of the bolt holes therein. That the claimant would furnish all of the armor and its accessories which might be required for the construction of the protective deck of said vessel. That the claimant would care for and preserve from injury the said vessel and all of the materials provided for or used in her construction during the progress of the contract work, and would keep her and all of the said materials, including those to be furnished by the claimant and those to be furnished by the United States, duly insured against fire and marine risks, breakage of ways, and risks of launching, until her preliminary or conditional acceptance by the United States, the loss, if any, to be payable to the Secretary of the Navy.

In consideration thereof the United States agreed (1) to pay the claimant certain sums of money; (2) to furnish the claimant all armor plates to be used in the construction of certain parts of the said vessel, including her side and diagonal armor, turrets, bar-
4 bettes, casemates, conning towers, ammunition tubes, and protections for her guns and loading positions, and all bolts for such armor plates; (3) to trim the plates to the drawing or template sizes and shapes within reasonable manufacturing limits as set forth in the specifications, and to drill and tap all bolt holes therein, as shown by the drawings and templates, and (4) to deliver the said armor plates at the shipyard of the claimant *"within the times and in the order required to carry on the work properly."*

2. Thereafter, in accordance with the terms of the said contract, the claimant procured materials to be used in the hull and machinery of the said vessel and the protective deck thereof, and as rapidly as possible furnished all plans, drawings, and templates necessary to show the dimensions and shape of each and every armor plate required for the construction of the said vessel, and proceeded with the work of construction, and at all times kept the said vessel and materials duly insured against loss by fire and marine risks, breakage of ways and the risks of launching, all of which things were duly approved by the Secretary of the Navy, and the claimant, from time to time, did and performed all other things which, under the terms of the said contract, it was required to do and perform, except in so far as the claimant was prevented from so doing by the acts and failures of the United States hereinafter set forth, and the claimant completed the said vessel and delivered her to the person thereunto designated by the Secretary of the Navy.

3. That in the course of the construction of the said vessel, to wit, on or about February 1, 1898, and at divers times thereafter, the claimant required for use, in order to carry on the work properly and in accordance with the terms of the said contract, certain of the said armor plates, which the United States had agreed to fur-
5 nish and deliver to the claimant, when the same should be so required, but the United States, contrary to its said agreement,

did not then furnish and deliver the said armor plates, although thereunto requested, and failed to do so for long periods of time thereafter. And whereas the claimant could have completed the said vessel in accordance with the terms of the said contract, and delivered her to the United States on or before September 24, 1899; by reason of the said failures of the United States to perform the said contract on its part, the said vessel's completion and delivery to the United States was delayed until on or about October 16, 1900, and the claimant was thereby greatly hindered in the construction of the said vessel, and was put to great additional expense in connection with the same for her care and preservation and that of the material used or provided for use in her construction, and for the insurance of the said vessel and material, as required by the said contract. This additional expense incurred by the claimant being the damage sustained by it on account of the failure of the United States to perform its contract as aforesaid amounted to the sum of seventy-eight thousand five hundred and eighty-four dollars and fourteen cents (878,584.14), as more fully appears from two bills of particulars hereto annexed, marked Exhibits B and C, respectively, and made part hereof.

4. The claimant is the only person owning or interested in the claim above set forth, and no assignment or transfer of the same, or any part thereof or interest therein, has been made. The claimant is justly entitled to receive and recover from the United States for and on account of its said damage the sum of seventy-eight thousand five hundred and eighty-four dollars and fourteen cents (878,584.14).

The claimant has made due demand upon the United States
6 for the payment of the said sum, but the Secretary of the Navy, as the agent of the United States in the premises, has declined to consider the said demand, and the said sum has not been paid, nor any part thereof. The claimant has always borne true allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement to rebellion against it.

Wherefore the claimant prays for judgment against the United States in the sum of seventy-eight thousand five hundred and eighty-four dollars and fourteen cents (878,584.14), and for such further relief as this honorable court may grant, both at law and in equity, in the premises.

THE WILLIAM CRAMP & SONS SHIP
AND ENGINE BUILDING COMPANY,
By CHARLES H. CRAMP, *President*.

McCAMMON & HAYDEN,
Attorneys for Claimant.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Charles H. Cramp, being duly sworn, deposes and says that he is the president of The William Cramp & Sons Ship and Engine Building Company, the claimant named in and which subscribed the foregoing petition; that he has read the same and knows the con-

tents thereof, and that the facts therein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me this 12th day of March, 1903.

ISAAC ARROTT,
Notary Public.

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EXHIBIT A.

Contract for the Construction of a Seagoing Coastline Battle Ship of About 11,000 Tons Displacement.

"Battle Ship No. 8."

Contract, of two parts, made and concluded this twenty-fourth day of September, A. D. 1896, by and between the William Cramp and Sons Ship and Engine Building Company, a corporation created under the laws of the State of Pennsylvania, and doing business at Philadelphia, in said State, represented by the president of said corporation, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part.

Whereas, The act entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, and for other purposes," approved June 10, 1896, authorized the construction of three seagoing coast-line battle ships, to be constructed in accordance with certain provisions contained in the act entitled "An act to increase the naval establishment," approved August 3, 1886, and to be in all their parts of domestic manufacture; and

Whereas, After due advertisement, the proposal of the said party of the first part for the construction of one of said vessels, including hull, machinery, engines, boilers, and appurtenances, equipment, except anchors and chains, the installation of the ordnance and ordnance outfit, and the fitting, fixing, placing and securing of all her armor complete in all respects, which vessel is, for the purposes of this contract, designated and known as "Battle Ship
8 No. 8," has been duly accepted by the Secretary of the Navy; and

Whereas, The drawings, plans, and specifications required by the said act have been duly provided, adopted, and approved in accordance with the provisions of said act of June 10, 1896:

Now, therefore, this contract witnesseth: That, in consideration of the premises, and for and in consideration of the payments to be made as hereinafter provided, the party of the first part, for itself and its successors and assigns, and its legal representatives, does hereby covenant and agree to and with the United States as follows, that is to say:

First. The party of the first part will, at its own risk and expense, construct, in accordance with the provisions of the acts of Congress relating thereto, and in conformity with the aforesaid drawings, plans, and specifications, one battle ship of about eleven thousand tons displacement, with fittings as specified, and equipment, except

anchors and chains; such vessel to be constructed of steel of domestic manufacture, and to be provided and fitted with machinery, engines, and boilers, also of domestic manufacture, complete in all their parts, appurtenances, and spare parts, and in all respects as described in the annexed drawings, plans, and specifications, and in the acts of Congress above referred to, and will deliver the same at the Navy Yard, League Island, Pennsylvania, to such person as the Secretary of the Navy may designate; it being, however, expressly understood and agreed that if any article or thing, included in, or covered by, the drawings, plans, and specifications aforesaid shall be found, during the prosecution of the work under this contract, to be not produced or manufactured in the United States, and if, after reasonable effort, it shall be found impracticable to obtain the same as an article of domestic manufacture, then, and in such case, provision shall be made, by or with the approval of the Secretary of the Navy, for such alteration in the drawings, plans, and specifications, or for the adoption of such new or different device or plan as may be found necessary in order to carry out and complete this contract, subject, as to increased or diminished compensation by reason of such change, to the conditions applicable to changes as expressed in the second clause of this contract.

Second. The construction of said vessel, the word vessel as used here and hereafter throughout this contract being intended to include everything covered by the drawings, plans, and specifications above referred to, shall conform in all respects to and with said drawings, plans, and specifications, which are hereto annexed and shall be deemed and taken as forming a part of this contract with the like operation and effect as if the same were incorporated herein. No omission in the drawings, plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the object and intent of the acts of Congress above referred to, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the party of the first part, and all claims for extra compensation by reason of, or for, or on account of, such extra performance, are hereby and in consideration of the premises expressly waived; and it is hereby further provided, and this contract is upon the express condition that the drawings, plans, and specifications aforesaid shall not be changed in any respect, when the cost of such change shall, in the execution of the work, exceed five hundred dollars, except upon the written order of the Secretary or Acting Secretary of the Navy; that if changes are thus made, the actual cost thereof, and the damage, if any, caused thereby shall be ascertained, estimated, and determined, by a board of naval officers, appointed by the Secretary of the Navy, and that the party of the first part shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation, which the said party of the first part shall be entitled to receive, if any, in consequence of such change or changes.

Third. The party of the first part will, as rapidly as possible, furnish all working drawings and templates necessary to show the

dimensions and shape of each and every armor plate required for use in the construction of the vessel, including those to be used in the construction of the side and diagonal belts, turrets, barbettes, casemates, conning towers, ammunition tubes, and protection for the guns and loading positions, and the position and sizes of the bolt holes therein—the spacing and dimensions of said bolt holes to be in accordance with the specifications and subject to the approval of the Secretary of the Navy; it being expressly understood and agreed that the party of the first part shall furnish all the armor, armor bolts, and their accessories required in the construction of the protective deck; that the party of the second part shall furnish all other armor, and the armor bolts, to be used in the construction of the vessel, including such as may be required in the construction of the side and diagonal belts, turrets, barbettes, casemates, conning towers, ammunition tubes, and protection for the guns and loading positions, trim such armor plates to the drawing or template sizes and shapes, within reasonable manufacturing limits, as set forth in the specifications, and drill and tap all armor-bolt holes therein,
11 as shown by said approved drawings and templates, and deliver said armor, and armor bolts, at the ship yard of the party of the first part, and within the times and in the order required to carry on the work properly; and that the party of the first part shall, at its own risk and expense, furnish all rivets and other fastenings, and drill, tap, and fit all holes for rivets and other fastenings used to connect any part of the hull framing to the armor for constructive purposes, except as hereinbefore mentioned, and properly fit, fix, place and secure to the vessel all the armor, including the side and diagonal belts, turrets, barbettes, casemates, conning towers, ammunition tubes, and protection for the guns and loading positions, as required by the aforesaid drawings, plans, and specifications; and it is expressly understood, covenanted, and agreed that if, upon the completion of the vessel, except the fitting, fixing, placing, and securing of the armor for her side and diagonal belts, turrets, barbettes, casemates, and conning towers, the party of the second part shall not have commenced the delivery of such armor to the party of the first part, then and in such case the vessel shall be subjected to the trial provided for in the tenth clause of this contract, and if, at and upon such trial, all the conditions and requirements relating thereto, except as to the fitting, fixing, placing, and securing of the armor for the side and diagonal belts, turrets, barbettes, casemates, and conning towers, shall be fulfilled the vessel shall be accepted as provided for in the eleventh clause of this contract; and if the party of the second part shall not have commenced the delivery of the armor for the side and diagonal belts, turrets, barbettes, casemates, or conning towers when the vessel is ready for her final trial, or within five months after either a preliminary or a conditional acceptance of the vessel, said vessel shall be finally accepted, sub-
12 ject to the conditions and requirements of this contract, and the cost of fitting, fixing, placing, and securing the armor for the side and diagonal belts, turrets, barbettes, casemates, and conning towers shall be ascertained, estimated, and determined by

a board of naval officers appointed by the Secretary of the Navy, the party of the first part shall be bound by the determination of said board, and such cost shall be deducted from the price of the vessel in the final settlement under this contract; but if the party of the second part shall commence and continue with reasonable diligence the delivery of the armor for the side or diagonal belts, turrets, barbettes, casemates, or conning towers of the vessel prior to her final trial, or within five months after either a preliminary or a conditional acceptance of the vessel, the party of the first part shall fit, fix, place, and secure all the armor to the vessel in accordance with the requirements of this contract and the drawings, plans, and specifications hereto annexed.

Fourth. The materials and workmanship used and applied in the construction of the vessel herein contracted for, in details and finish, shall be first-class and of the very best quality, and shall, from the beginning to the end of the work, be subject to the inspection of the Secretary of the Navy; it being hereby understood, covenanted, and agreed that the said Secretary may appoint suitable inspectors, to whom the party of the first part shall furnish such samples of said materials, and such information as to the quality thereof, and the manner of using the same, as may be required, and also any assistance such inspectors may require in determining the weight and quality of steel and other metals, and of wood and other materials, either used or intended for use in the construction of the vessel, and that the inspectors may, with the approval of the said Secretary, peremptorily reject any unfit material or forbid
13 the use thereof. The inspectors shall, at all times during the progress of the work, have full access thereto, and the party of the first part shall furnish them with full facilities for the inspection and superintendence of the same.

Fifth. The steel to be used in the construction of the vessel herein contracted for shall conform to the "Specifications for inspection of steel for use in the construction of the hulls and machinery of battleships Nos. 7, 8, and 9, for the United States Navy," approved by the Secretary of the Navy under date of July 3, 1896, which specifications are annexed to and form a part of this contract.

Sixth. The party of the first part will, at its own expense, prepare such plans or drawings as may be necessary during the progress of the work, and will submit the same to the Navy Department for approval before the material is ordered or the work commenced.

Seventh. The party of the first part, in consideration of the premises, hereby covenants and agrees to hold and save the United States harmless from and against all and every demand or demands of any nature or kind for, or on account of, the adoption of any plan, model, design, or suggestion, or for, or on account of, the use of any patented invention, article, or appliance which has been or may be adopted or used in or about the construction of said vessel, or any part thereof, under this contract, and to protect and discharge the Government from all liability on account thereof, or on account of the use thereof, by proper releases from patentees or otherwise, and to the satisfaction of the Secretary of the Navy.

Eighth. The vessel herein contracted for, and all materials and appliances provided for and used, or to be used, in the construction thereof, shall be kept duly insured against *fire* and *marine risks, breakage of ways* and *risks of launching*, which insurance shall be renewed and increased, from time to time, by and at the expense of the party of the first part, until the preliminary or the conditional acceptance of the vessel, the loss, if any, to be stated in the policies as payable to the Secretary of the Navy; the insurance to be effected in such manner and in such companies as shall be approved by him, and in an amount to be fixed, from time to time, by him, not exceeding the amount of the payments made under this contract.

Ninth. The vessel herein contracted for shall be completed in accordance with the drawings, plans, and specifications annexed hereto and ready for delivery to the party of the second part, on or before the expiration of three years from the date hereof; but the lien of the party of the second part upon said vessel, and the materials on hand for use in the construction thereof, respectively and collectively, for all moneys, paid on account thereof, shall commence with the first payment, and shall thereupon attach to the work done and materials furnished, and shall, in like manner, attach from time to time, as the work progresses, and as further payments are made, and shall continue until it shall have been properly discharged. In case the completion of the vessel as aforesaid shall be delayed beyond the said period of three years, deductions shall be made from the price stipulated in this contract for each and every day (excepting Sundays) during the continuance of such delay, and until the vessel shall be completed as aforesaid and ready for delivery to the party of the second part, as follows, viz: During the three months next succeeding the expiration of said period, seventy-five dollars ($75.00) a day; during the fortieth, forty-first and forty-second months from the date of this contract, one hundred and fifty dollars ($150.00) a day; and for each and every day (excepting Sundays) during which such completion shall be delayed beyond the period of three years and six months from the date of this contract three hundred dollars ($300.00); and all such deductions from the price of the vessel to be made, from time to time, from any payment or payments falling due under this contract; *provided, however*, that such delay shall not have been caused by the act of the party of the second part, or by fire or water, or by any strike or stand-out of workmen employed in the construction of the vessel, or by other circumstances, beyond the control of the party of the first part; but such circumstances shall not be deemed to include delays in obtaining materials when such delays arise from causes other than those herein specified; *and provided, further*, that in case of any such alleged delay, the party of the first part shall give immediate notice thereof in writing to the Secretary of the Navy.

In case any questions shall arise, under this contract, concerning deductions from the price of the vessel herein contracted for, such question, with all the facts relating thereto, shall be submitted to the

Secretary of the Navy for consideration, and his decision thereon shall be conclusive and binding upon the parties to this contract.

All delays which the Secretary of the Navy shall find to be properly attributable to the party of the second part, or to its authorized officers, or agents, or any or either of them, and to have been delays operating upon the completion of the vessel within the time specified therefor in this contract, shall entitle the party of the first part to a corresponding extension of the period prescribed for the completion of the vessel; *provided, however*, that no delay nor the alleged cause or causes thereof attributed by the party of the first part to
16 the party of the second part, its officers or agents, shall be considered by the Secretary of the Navy unless the party of the first part shall, at the time of the occurrence of such delay, notify him in writing of the facts and circumstances in each case, and of the extent to which the said party of the first part claims that the completion of the vessel is thereby delayed.

Tenth. The party of the first part hereby further covenants and agrees that the vessel to be constructed under this contract shall be sufficiently strong to carry her armor, and the armament, equipment, coal, stores, and machinery, prescribed by the Secretary of the Navy and indicated in the annexed drawings, plans, and specifications that the total weight of said machinery, including engines, boilers, and appurtenances; all fixtures in engine and fire rooms, smoke pipes, distilling apparatus, stores, spare parts, heating apparatus, tools in workshop, and water in boilers, condensers, pumps, pipes, and stern tubes (but not including turret machinery, capstan, windlass, steering gear, or winches), shall not exceed eleven hundred and thirty tons (1130 tons); this weight to be determined from the certified records of the actual weight of the parts of the machinery as they are sent on board the vessel to be connected up, except the weight of the contained water, which shall be calculated from the actual volumes in steaming condition, as shown on the certified drawings of the completed machinery, the weight to be calculated for salt water, except for those parts where fresh water only is used; that if said total weight be exceeded, a deduction of five hundred dollars ($500) a ton shall be made from the contract price of the vessel for each ton of excess weight over that stipulated, and that if said total weight be exceeded by five per cent, a further deduction of ten thousand dollars ($10,000) shall be made from the contract price of the vessel; all such deductions to be made
17 from any payment or payments falling due under this contract; and that when the vessel is completed, as required by the drawings, plans, and specifications, and ready for delivery to the party of the second part, she shall be subjected to a trial trip, in the open sea, under conditions prescribed or approved by the Secretary of the Navy, to test the hull and fittings, machinery, including engines, boilers, and appurtenances, the equipment, the installation of the ordnance and ordnance outfit, and the speed of the vessel, and that she shall be accepted only on fulfillment of, and subject to the conditions and agreements hereinafter set forth.

(1.) That the working of the machinery in all its parts shall be to the satisfaction of the Secretary of the Navy.

(2.) The party of the first part hereby guarantees that the speed developed by the vessel, upon said trial under conditions prescribed or approved by the Secretary of the Navy, shall be not less than an average of sixteen (16) knots an hour, maintained successfully for four (4) consecutive hours, during which period the air pressure in the fire room shall not exceed an average of one inch of water, the vessel to be weighted to a mean draft of twenty-three feet six inches (23 feet 6 inches).

(3.) That said vessel shall be found to be strong and well built, and in strict conformity with the contract drawings, plans, and specifications, and shall be approved by the Secretary of the Navy, *provided*, That if, at and upon said trial, there shall be any failure in the vessel to meet fully the requirements of this contract, the party of the first part shall be entitled to make further trials, sufficient in number to reasonably demonstrate her capabilities; *and provided also*, That the number of trials shall be determined and limited by the Secretary of the Navy, and that all the ex-
18 penses of all trials prior to the preliminary or the conditional acceptance of the vessel shall be borne by the party of the first part.

Eleventh. If, at and upon the trial before mentioned, the foregoing requirements and conditions relating to the vessel herein contracted for shall be fulfilled, and if the speed (16 knots) guaranteed as aforesaid shall be developed and maintained as aforesaid, then and in such case the vessel shall be preliminarily accepted, and payment of the last three installments of the price stipulated in this contract, and of all reservations, shall be made, subject, however, to a special reserve of sixty thousand dollars ($60,000) from and out of the reservations hereinafter provided for; but if the speed developed and maintained by the vessel on her trial shall fall below the speed (16 knots) guaranteed as aforesaid, but not below 15 knots an hour, she shall be conditionally accepted, subject to deductions from the price of the vessel on account of her failure to reach the speed (16 knots) guaranteed as aforesaid, at the rate of twenty-five thousand dollars ($25,000) a quarter knot for speed between 16 knots and 15½, and fifty thousand dollars ($50,000) a quarter knot for speed between 15½ and 15 knots, *provided, however*, that all the other requirements and conditions of this contract shall have been fulfilled and, in case of such conditional acceptance, that the last three installments of the price of the vessel and the reservations on payments under this contract shall constitute a reserve fund which shall be applicable to or towards the satisfaction of such deductions, and shall be retained by the party of the second part for that purpose; *and provided further*, that if the vessel fails to exhibit an average speed of at least 15 knots an hour it shall be optional with the Secretary of the Navy to reject her or accept her at a reduced price and upon conditions to be agreed upon between the said Secretary and the party of the first part.

19 In case of a preliminary acceptance of said vessel, the said special reserve of sixty thousand dollars ($60,000), or, in case of a conditional acceptance of the vessel, the said reserve fund, or so much thereof as may, in the judgment of the Secretary of the Navy, be necessary, shall be held until the vessel has been finally tried, after being fully equipped, armed, or weighted correspondingly, and in all respects complete and ready for sea, under conditions prescribed or approved by the Secretary of the Navy; *provided*, that such final trial shall take place within five months from and after the date of the preliminary or the conditional acceptance of the vessel, and that the expenses thereof shall be borne by the party of the second part.

If, at and upon such final trial, or at any time within five months after the preliminary or the conditional acceptance of said vessel, such final trial not having taken place, any weakness or defect in the vessel, or any failure, breaking down or deterioration, other than that due to fair wear and tear, of any part or parts of the machinery, engines, boilers or appurtenances, shall appear, the same shall be corrected and repaired, to the satisfaction of the Secretary of the Navy, at the expense of the party of the first part, and the party of the first part may, if it so desires, have an engineer of its own selection present in the engine room of said vessel at any time or times during said period, who shall have full opportunity to observe and inspect the working of the machinery in all its parts, but without any directing or controlling power over the same, and, in case such engineer shall be a civilian, his compensation shall be paid by the party of the first part.

If said vessel be not in readiness for such final trial within five months from the date of her preliminary or conditional ac-
20 ceptance, through no fault or delay on the part of the party of the first part, and if there shall have appeared no weakness or defects in the vessel, nor any failure, breaking down or deterioration, other than that due to fair wear and tear, of any part or parts of the machinery, engines, boilers or appurtenances, then the vessel shall be finally accepted, and the said special reserve, or the surplus, if any, of the said reserve fund paid, subject, however, to deduction on account of any reductions that may be made in the price of the vessel under the provisions of this contract.

In case of the rejection of the vessel for any of the causes provided for in this contract, the party of the first part shall refund to the party of the second part on demand, or within sixty days thereafter, all payments theretofore made to the said party of the first part for or on account of the construction of said vessel.

Twelfth. The party of the second part having approved, as foundation for this contract, drawings, plans, and specifications of a vessel which it has reason to think would, if properly carried out, result in the production of a speed of not less than sixteen knots an hour, assumes no responsibility with reference thereto, and will consider any changes suggested by the party of the first part either as to hull or machinery, and as the responsibility is with the party of the first part, will feel it to be its duty to deal liberally with any proposed

changes, so long as the size, strength, and character of the vessel shall remain substantially the same; changes in plans or specifications involving increased or decreased expense to be dealt with as provided for in the second clause of this contract.

Thirteenth. It is further mutually understood, covenanted and agreed that, in case of the failure or omission of the party of the first part at any stage of the work prior to its completion,
21 from any cause or causes other than those specified in the ninth clause of this contract, to go forward with the work and make satisfactory progress towards its completion within the prescribed period, it shall be optional with the Secretary of the Navy to declare this contract forfeited. The party of the first part shall thereupon, and on notice thereof, in writing, be, and the said party of the first part does hereby, in consideration of the premises, for itself and its successors and assigns, and its legal representatives, acknowledge itself to be justly indebted to the party of the second part, as for liquidated and ascertained damages, in a sum equal to the aggregate amount of all payments theretofore made to it for, or on account of work done under this contract, and does further covenant and agree, as aforesaid, to refund the same on demand, or within sixty days thereafter, and that the party of the second part shall and may hold, as collateral security for such refund, said vessel, or so much thereof as shall then have been constructed, and all materials furnished or on hand for the purposes of construction. The Secretary of the Navy shall thereupon cause to be taken and filed a full and complete statement and inventory of all work done or commenced in, upon, or about said vessel, and of all materials on hand applicable thereto, the property of the party of the first part, and shall cause the same to be duly valued by a board, consisting of not less than five persons, qualified by knowledge and experience for the discharge of their duties, to be appointed by the Secretary of the Navy, which board shall proceed without unnecessary delay to examine such work and materials and ascertain and declare the fair market value thereof, including a reasonable and customary margin of profit upon so much of the work as shall have been, at the time such forfeiture is declared, satisfactorily performed; and upon
22 such examination the party of the first part may attend, by its representative, or, if it so desires, by counsel, and submit such evidence as the board may deem proper.

Fourteenth. Upon receipt of the report and finding of said board, and upon his approval thereof, the Secretary of the Navy may, in his discretion, proceed to complete said vessel, in accordance with the contract, drawings, plans, and specifications, using for that purpose all suitable materials on hand and included in the inventory aforesaid; and the title to said vessel, or so much thereof as shall have been completed, and to all such materials shall forthwith vest in the party of the second part; and the party of the first part does hereby, for itself and its successors, and assigns, and its legal representatives, covenant and agree to and with the party of the second part that, on receiving notice of the intention of the Secretary of the Navy to proceed to the completion of the work, it will

surrender said vessel and all materials on hand, together with the use of the yard or plant, and all machinery, tools, and appliances appertaining thereto and theretofore used or necessarily to be used in and about the completion of the work.

Fifteenth. In case the Secretary of the Navy shall proceed, under the foregoing clause, to complete the work, such procedure shall be without unnecessary delay, and shall be at the risk and expense of the party of the first part, which party shall be chargeable with any increase in the cost of materials or labor incurred by reason of its failure to perform this contract. Upon the final settlement of the liability of the party of the first part an account shall be stated substantially as follows:

The party of the first part shall be charged—

1 With all payments made.

2. With the extra cost, if any, of materials and labor and
23 all other extra expenses, if any, incurred in the completion of the work.

The party of the first part shall then be credited with the value of the work done up to the time of suspension, and of the materials on hand, as ascertained by the board, under the provisions of the thirteenth clause of this contract and approved by the Secretary of the Navy; and with such payments, if any, as may have been refunded. If a balance shall thereupon appear in favor of the party of the first part, the same shall be paid to and accepted by the said party of the first part in full discharge of all claims under this contract; but if a balance shall appear in favor of the party of the second part, the party of the first part hereby covenants and agrees, as aforesaid, to pay and discharge the same on demand.

Sixteenth. It is mutually understood, covenanted, and agreed by and between the respective parties hereto that it shall not, under any circumstances, be obligatory upon the party of the second part to accept or pay for the vessel, or any part thereof, to be constructed under this contract, unless she shall have been completed in strict conformity with this contract, and in accordance with the provisions of the acts of Congress, relating thereto, and that this qualification shall be deemed and taken as applicable and applying to each and every clause, covenant, and condition, express or implied, in this contract contained.

Seventeenth. It is mutually understood, covenanted, and agreed by and between the respective parties hereto that this contract shall not, nor shall any interest herein, be transferred by the party of the first part to any other person or persons.

Eighteenth. It is hereby mutually and expressly covenanted and agreed, and this contract is upon the express condition that
24 no member of or delegate to Congress, officer of the Navy, nor any person holding any office or appointment under the Navy Department, is or shall be admitted to any share or part of this contract, or to any benefit to arise therefrom; but this stipulation, so far as it relates to members of or delegates to Congress, shall not be construed to extend to this contract, it being made with an incorporated company.

Nineteenth. The party of the second part, in consideration of the premises, does hereby contract, promise and engage to and with the party of the first part, as follows:

1. The price to be paid for the vessel to be constructed and furnished, in accordance with this contract, shall be two million six hundred and fifty thousand dollars ($2,650,000).

2. Payments shall be made by the party of the second part in thirty equal installments, as the work progresses, with a reservation of ten per cent. from each installment.

3. No payment shall be made except upon bills in quadruplicate, certified by the inspectors of hull and machinery of the vessel, in such manner as shall be directed by the Secretary of the Navy, whose final approval of all bills thus certified shall be necessary before payment thereof.

4. All warrants for payments under this contract shall be made payable to the party of the first part or its order.

5. Payment of the last three installments shall not be made except as provided for in the eleventh clause hereof.

6. When a payment is to be made under this contract, as a condition precedent thereto, the Secretary of the Navy may, in his discretion require, for the protection of the party of the second part, evidence satisfactory to him to be furnished by the party of the first part, that no liens or rights *in rem* of any kind against said vessel, or her machinery, fittings, or equipment, or the material on hand for use in the construction thereof, have been or can be acquired, for or on account of any work done or any machinery, fitting, equipment, or material already incorporated as a part of said vessel, or on hand for that purpose, or that such liens or rights have either been released absolutely or so subordinated to the rights of the Government as to make its lien for all payments paramount, so as not to encumber or hinder in any way the rights of the Government to accept or reject said vessel, and so as to become absolutely extinguished in case of the acceptance of the vessel.

7. When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said special reserve, or the surplus, if any, of said reserve fund, or so much of either as the said party of the first part may be entitled to, on the execution of a final release to the party of the second part in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract.

Twentieth. If any doubts or disputes arise as to the meaning of anything in the drawings, plans, or specifications, or if any discrepancy appear between said drawings, plans or specifications, and this contract, the matter shall be at once referred to the Secretary of the Navy, for determination, and the party of the first part hereby binds itself and its successors and assigns, and its legal representatives to abide by his decision in the premises.

In witness whereof the respective parties hereto have hereunto set their hands and seals the day and year first above written.

THE WILLIAM CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY.

[SEAL.] By CHAS. H. CRAMP, *President.*

Signed and sealed in the presence of —

Attest:

JNO. DOUGHERTY, *Secretary.*

THE UNITED STATES.

[SEAL.] By W. McADOO,

Acting Secretary of the Navy.

SAM. C. LEMLY,

Judge Advocate General.

As to W. McAdoo,

Acting Secretary of the Navy.

EXHIBIT B.

PHILADELPHIA, *December* 6, 1900.

United States Government, Department of the Navy, Bureau of Construction and Repair.

to

The William Cramp & Sons Ship and Engine Building Company.

Dr.

For charges for care and preservation of the U. S. B. S. *Alabama* (exclusive of machinery) in consequence of delay in completion of the vessel, caused by the failure of the Government to deliver her armor at the times and in the order required to carry on the work properly, from September 24, 1899, date of expiration of contract, to October 16, 1900, both dates inclusive, as follows:

Wharfage.—388 days at one cent per ton per day on 6,802.12 gross tons (tonnage based on Report of Bureau of Construction and Repair, 1899, p. 71)		$26,392.23
Watching.—One night and one day watchman for the above period, at $5 for 24 hours		1,940.00
Electric Lighting.—Illuminating vessel 348 days during the above period, at $46.12		16,049.76
Painting.—Touching up and repainting water bottoms, trimming tank, cofferdams, boiler-rooms, dynamo-rooms, engine-rooms, woodwork, military masts, outside of hull, and cork painting throughout ship, and turpentining decks:		
5,000 hours painting, at 40c	$2,000.00	
3,825 lbs. red-lead oil, at 10c	382.50	

	1,750 lbs. color, at 12c.	210.00	
	6 gals. hard oil, $4.50	27.00	
	10 gals. varnish, at $3.75	37.50	
	4,120 lbs. turpentine, at 6c.	247.20	
	16 bags sawdust, at 25c.	4.00	
			2,908.25
	Keeping ship clean from snow and ice, removing debris, and general attendance and scaling:		
	25,829¾ hrs. laborers, at 22½c.	—	5,811.69
28	Covers.—Canvas over hatches, ventilators, and turrets:		
	1,230 lbs., at 15c.	—	$184.50
	Running heaters to heat ship:		
	5,420 hrs. machinists, at 35c.	—	1,897.00
	Turning over dynamo, steering, boat crane, ice machine, and windlass engines, galley, ranges and bottom and other machinery in hull specifications:		
	5,855 hours machinists, at 35c.	$2,049.25	
	5,855 hours helpers, at 22½c.	1,317.38	
			3,366.63
	Running air machines at night in order to obtain pressure to cut armor bolt holes; extra time which would not have been necessary had the armor arrived in time to carry on the work properly:		
	820 hours machinists, at 35c.	$287.00	
	240 hours helpers, at 22½c.	54.00	
			341.00
	Tearing out scupper pipes and putting in place again to allow armor to go on. Had the scuppers not been in place the ship would have been damaged by water; it was necessary, therefore, to install the scuppers before the armor arrived:		
	4,000 hours machinists, at 35c.	$1,400.00	
	870 hours helpers, at 22½c.	198.75	
29	960 hours pattern-makers, at 37½c.	$360.00	
	800 ft. lumber, at 10c.	80.00	
			$2,038.75
	Turning ship to avert magnetic polarization:		
	Tow-boat service	$75.00	
	180 hours riggers, at 30c.	54.00	
	6 hours locomotive cranes, at $3.00	18.00	

174 men were working on the ship whose time was lost, but who were paid, through air and electric light connections being disconnected for two hours, each averaging 20c. per hour, or	69.60	
		216.60
Tow-boats breaking ice around ship	—	15.00
Insurance.—Cancellation value of policies in force Sept. 23, 1899	$3,764.16	
Insurance which would not have been required had the ship been delivered:		

Date of beginning.	*Cost.*	
September 29, 1899	$24.75	
" 30, "	187.50	
October 19, "	31.87	
December 8, "	170.47	
" 14, "	320.86	
" 28, "	161.51	
January 11, 1900	327.28	
" 25, "	177.68	
30		
February 20, 1900	$323.00	
" 22, "	181.26	
March 10, "	202.07	
April 12, "	202.91	
" 18, "	320.85	
May 7-14-17, "	699.78	
June 15&20, "	629.36	
July 18, "	331.23	
" 29, "	143.75	
August 10, "	1,401.90	
" 16, "	310.90	
" 25, "	1,206.17	
" 28, "	713.08	
	$11,832.34	

Return premiums allowed on cancellation October 16, 1900	2,027.04	
		$9,805.30
Total		$70,996.66

EXHIBIT C.

PHILADELPHIA, *December* 6, 1900.

United States Government, Department of the Navy, Bureau of Steam Engineering,
to
The William Cramp & Sons Ship and Engine Building Company,
Dr

For charges for care and preservation of the propelling machinery of the U. S. B. S. *Alabama* in consequence of delay in completion of the vessel, caused by the failure of the Government to deliver her armor at the times and in the order required to carry on the work properly, from September 24, 1899, date of expiration of contract, to November 16, 1900, both dates inclusive, as follows:

31

September, 1899.—Overhauling fire-room blowers, cleaning boilers, running temporary steam pipes, cleaning feed-tanks and running pumps	$236.06
October, 1899.—Examining and lubricating cylinders and piston, running temporary bilge suction pipe, lubricating and greasing circulating pumps, overhauling fire-room blowers, and tightening up fire main joints	1,032.32
November, 1899.—Cleaning condenser tubes, overhauling engine-room blower, rejointing fire main pipe, adjusting main bearings, cleaning boilers, running water boat suction, overhauling drains from fire-room blowers, running pumps, and examining water service pipe and valves	231.47
December, 1899.—Overhauling cross head brasses, fitting up temporary boilers for heating, running suction pipe from temporary tank, running temporary heater pipe, overhauling piston rod packing, running temporary steam pipe, lubricating air and feed pumps, and cleaning boilers	237.87

32

January, 1900.—Connecting temporary steam pipe to stern tubes, getting boilers ready for steam, greasing pumps, examining piston rods and valve stem packing, bracketing extension levers on temporary suction, donkeyman on temporary boiler, bleeding auxiliary feed pipes, and putting covers on temporary boiler	301.83
February, 1900.—Drilling for and running water boat suction, donkeyman on temporary boiler, running pumps, cleaning feed tanks, putting fish oil in boilers and stacks, fish oiling tubes, renewing auxiliary steam joints, and cleaning back connection in boilers	137.68

March, 1900.—Overhauling cross head guides and slippers, running temporary steam pipe, putting fish oil in boiler tubes, running pumps, overhauling crank shaft, donkeyman, watchman, overhauling crank pins, running water boat suction, firing temporary boiler, cleaning and greasing machinery, repacking valves in fire-room, assembling and adjusting guides..... 625.63

April, 1900.—Overhauling packing in piston stuffing boxes, disconnecting temporary boiler, running pumps, overhauling guides, connecting temporary steam pipes, cleaning and greasing machinery, overhauling blowers, examining and adjusting suspension links, overhauling stop valve gear, donkeyman.. 318.29

May, 1900.—Running pumps, painting bilge, donkeyman, rejointing auxiliary steam valves, cleaning boilers, disconnecting and removing temporary steam pipe, examining feed pump pistons, overhauling auxiliary feed pumps, overhauling fire and bilge
33 pumps, overhauling main feed pumps, examining McComb strainers, examining sanitary pumps, cleaning and greasing machinery, examining bilge suction plugs, overhauling thrust bearing water service, rejointing boiler drain pipe, overhauling lubricators, overhauling safety valve gear..... 261.66

June, 1900.—Adjusting turning engine, running pumps, donkeyman, overhauling bilge suction plug cocks, rejointing auxiliary feed drains, overhauling drains from dynamo-rooms, overhauling joints, steam to crane, rejointing auxiliary steam and exhaust pipes..... 184.31

July, 1900.—Donkeyman, running pumps, overhauling and rejointing steam to deck machinery, getting boilers ready for steam, overhauling boilers, turning machinery..... 200.58

August, 1900.—Donkeyman, engineer, rejointing auxiliary steam drains, cleaning and greasing machinery, examining main and auxiliary steam joints, running blowers and pumps, overhauling steam gauge system, rejointing boiler manhole plates, overhauling oil service, tightening joints in water bottom, oil stowing pistons, tightening manhole covers, tightening joints on cylinders, examining pistons, cleaning boilers, examining valve chests, examining pumps..... 541.39

September, 1900.—Cleaning boilers, donkeyman, engineer, cleaning and greasing machinery, tightening main and auxiliary steam and exhaust joints..... 979.85

34 October, 1900.—Cleaning boilers, donkeyman, engineer, running pumps, cleaning and greasing machinery..... 649.14

350 tons bituminous coal, at $3 ..... $1,050.00

424 gals. fish oil, at 45c 190.80

156 gals. lubricating oil, at 60c.....	93.60	
200 lbs. waste, at 6c.....	12.00	
		1,346.40
Total.....		$7,587.48

35 II.—*Traverse. Filed December* 12, 1905.

In the Court of Claims of the United States, December Term, A. D. —.

No. 22,535.

THE WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT.
Assistant Attorney General.

36 III.—*Argument and Submission.*

On the 12th and 13th days of December, 1905, this cause was argued by Mr. James H. Hayden, for the claimant, and by Mr. F. W. Collins, for the defendants, and submitted.

Subsequently, to wit, on December 28, 1907, the case was remanded to the Trial Calendar for oral argument by the following order:

It is ordered that this case be remanded to the Trial Calendar for the reasons stated in memorandum.

Memorandum.

Argument is desired solely upon the question of the effect of the final receipt and wherein the execution thereof takes it out of the recent decision of the Supreme Court in the case of The William Cramp and Sons Ship and Engine Building Company respecting the battle ship Indiana.

BY THE COURT

Accordingly on December 4, 1907, Mr. James H. Hayden was heard for the claimant and Mr. F. W. Collins for the defendants and the case was resubmitted.

37 IV.—*Findings of Fact and Conclusion of Law and Opinion of the Court. Filed February* 3, 1908.

THE WILLIAM CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant is a corporation incorporated and existing under the laws of the State of Pennsylvania.

II.

On September 24, 1896, the claimant and the United States entered into the contract, annexed to the petition herein, providing for the construction and delivery of a battle ship designated as "Battle ship No. 8," and now known as the U. S. S. "Alabama," said contract being designated as "Exhibit A."

III.

Upon the execution of the said contract the claimant made all preparations necessary for the commencement of work upon the construction of the said battle ship. December 2, 1896, her keel was laid, and thereafter the work progressed with due dispatch, and the battle ship would have been completed and ready for delivery within the contract period if the Government had delivered to the claimant the armor and armor bolts within the times and in the order required to carry on the work properly, as obligated so to do by clause 3 of the contract.

IV.

In due course the claimant furnished to the United States working drawings and templates, showing the dimensions and shape of each and every armor plate required for use in the construction of the said battle ship.

38 V.

On or about February 15, 1898, work upon the vessel had progressed to a point where the delivery of her internal armor became necessary, in order that her construction might proceed within the contract period. The first installment of plates for her internal armor was not received by claimant until December 22, 1898, and the last installments were not delivered by defendants until March 11, 1899, and notwithstanding these hindrances the claimant prosecuted the work upon the vessel, in so far and as rapidly as it could be done.

VI.

On May 18, 1898, the said battle ship was launched. She had then progressed toward completion to the extent of about 55 per cent.

VII.

On or about June 30, 1898, the superintending constructor, acting as the representative of the United States at the claimant's shipyard, made a report to the Chief of the Bureau of Construction and Repair, in which he stated:

"It is estimated that on June 30, 1898, the vessel ("*Alabama*") was 60 per cent. completed. The contractor's trial, final completion, and delivery of the vessel to the government will depend entirely upon the delivery of the armor and armament, and the ship should be ready for final delivery to the government within two months after the receipt of the armor and armament at the shipbuilding yard."

He stated further that the probable date of the vessel's final completion was September 21, 1899, that estimate being based upon the supposition that all armor would be delivered *without undue delay*.

VIII.

On June 9, 1898, the United States entered into a contract with the Bethlehem Iron Company, which provided for the manufacture and delivery by the latter of the armor required for the said battle ship.

IX.

After the launching of the said battle ship, in order that work upon her might proceed in proper order to complete her within the contract period, the claimant required for use certain parts of her external armor, namely, the plates for her side armor or main belts, side casemates, upper and lower; but the United States did not on May 18, 1898, deliver the same. Plates for the external armor of the said battle ship were delivered to the claimant from time to time between May 27, 1899, and June 7, 1900, as follows:

Armor.	Date of delivery.
Side or main belt	May 27 to Nov. 10, 1899.
Lower side casemates	Nov. 28, 1899, to Jan. 3, 1900.
Upper side casemates	Jan. 3 to Feb. 13, 1900.
39 Upper side casemate wings	Jan. 12 to Feb. 12, 1900.
Signal tower	June 15, 1899.
Turret—aft	Apr. 5 to Apr. 21, 1899.
Turret—forward	May 9 to June 7, 1900.
6-inch gun protections	Sept. 23 to Oct. 1, 1899.

X.

On or about June 30, 1900, the superintending constructor, acting as the representative of the United States at the claimant's shipyard,

made a report to the Chief of the Bureau of Construction and Repair, in which he stated:

"The vessel is at present estimated to be 97 per cent. completed. I estimate that the date of the official trial can be about August 15, 1900, and that the ship will be ready for commissioning by the 30th of September, 1900."

XI.

On or about July 18, 1899, a strike occurred among the workmen in the claimant's yard, which involved from 300 to 2,000 men at different times between said date and the early spring of 1900. It is not shown that said strike materially hindered or delayed the work on the *Alabama*. The only workmen on the *Alabama* engaged in the strike were about 160 riveters, but the claimant within a reasonable time thereafter installed a system of machine riveting, by means of which the claimant was enabled to more speedily perform said work, and by said means expedited the work beyond what it would have done had said riveters not joined in the strike.

XII.

From June 7, 1900, when the last shipment of armor plate for the said battle ship was delivered to the claimant the work of finishing her was prosecuted in due order and with all possible dispatch.

Her official trial or speed test was held on August 20, 1900, and on October 16, 1900, she was delivered to the United States and went into commission as a vessel of the United States Navy.

XIII.

By reason of the failure of the United States to furnish the armor for the said battle ship as it was required to carry on the work of her construction properly, her completion was delayed for a period of 87 days.

XIV.

By reason of delays on the part of the armor contractors, the armor was not delivered to the claimant company as early as it should have been, and the vessel was not delivered to the defendant until October 16, 1900.

Upon the request of the claimant company, conveyed by communication bearing date September 28, 1899, the Secretary of the Navy, on October 9, 1899, by letter, notified the claimant company that the "provisions of the ninth clause of the contract for the construction of said vessel, relating to deductions from the contract price for delays, will be suspended for a reasonable time, pending the final delivery of the armor, and the question of extension of time will be determined when the armor is all delivered," and later, on October 31, 1900, upon recommendation of the Bureaus of Steam Engineering and Construction and Repair, the contract time for the completion of the *Alabama* was duly extended until the date of its preliminary acceptance, or October 22, 1900.

In consequence of this extension, no deduction on account of delay

was made from the contract price of the vessel, which was paid to the claimant company in full.

XV.

On February 9, 1901, the claimant directed a letter to the Secretary of the Navy in which it made claim for the damage which it had sustained in consequence of the said failures and delays of the United States.

On February 13, 1901, the Secretary of the Navy directed the following letter to the claimant:

NAVY DEPARTMENT,
WASHINGTON, *February* 13, 1901.

GENTLEMEN: Referring to your letter of the 9th instant, enclosing statement of account and claiming reimbursement, in the sum of $66,973.23, of expenses incurred in caring for the *Alabama* and her machinery during the delay in her completion, for which it is alleged the Government is responsible, I have to state that while, from a casual consideration of the matter, it might seem proper that the papers should be referred to the bureaus concerned for examination and report, it appears, after a careful consideration of the subject, that the claim, being for unliquidated damages, is of a kind the Department has no authority under the law to entertain.

Very respectfully,

JOHN D. LONG, *Secretary*.

The William Cramp & Sons, Ship and Engine Building Company, Philadelphia, Penna.

On April 15, 1901, the claimant, by its counsel, directed the following letter to the Secretary of the Navy:

WASHINGTON, D. C., *April* 15, 1901.

In the Matter of the Final Release on the U. S. S. *Alabama*.

SIR: In behalf of the William Cramp & Sons Ship and Engine Building Company we beg to say:

The company is in receipt of these papers which you sent to it for execution: (I) A form for the final release to be given on account of the construction of the U. S. S. *Alabama*, and (II) a form
41 of the contract whereby the company will agree to indemnify the United States against all manner of demands made for or on account of the use of the patented inventions employed in the construction of the vessel.

We enclose to you herewith the contract of indemnity duly executed by the company.

We also enclose a final release duly executed. We invite your attention to a proviso, inserted by the company, which does not appear in the form of release presented by you. This proviso is as follows (p. 3):

"*Provided*, That nothing herein shall operate as a waiver of this company's right to sue for and recover judgment in the Court of Claims for damages incurred or losses sustained by the company in the prosecution of the contract work which were occasioned by delays or defaults on the part of the United States."

On February 9, 1901, the company presented to you a claim for damages to the amount of $66,973.23, which it had sustained by reason and as a result of the failure of the United States to furnish armor, to be used in the construction of the vessel, at the times and in the manner prescribed by the contract for the construction of the vessel.

In your letter directed to the company on February 13, 1901, you stated that this claim, "*being for unliquidated damages, is of a kind the Department has no authority under the law to entertain.*"

It has frequently been held by the Supreme Court of the United States and by the Court of Claims that the head of an Executive Department is not vested with jurisdiction to hear and determine claims for unliquidated damages, even though they may grow out of contracts made by his department.

By the act of March 3, 1887, known as the "*Tucker Act*," the Court of Claims is vested with jurisdiction to hear and determine such claims.

The release submitted by you, without qualification, such as the proviso inserted by the company, would undoubtedly be held to include not only all claims which you have passed upon and over which you might have jurisdiction, but also claims which you had not entertained and over which you possess no jurisdiction. By executing the release without the qualification the company would be deprived of the right to seek and obtain its remedy in the only forum possessing jurisdiction in the premises. The proviso inserted does not affect the efficiency or completeness of the release so far as it deals with matters coming within your jurisdiction. We trust that you will approve the release as amended, appreciating that it merely preserves the company's right to the hearing and adjudication of its claim, as prescribed by the "*Tucker Act*."

We respectfully request you to order payment to the company for the sum of $40,000, the amount of the consideration named in the release.

Very respectfully, McCAMMON & HAYDEN.

The Hon. John D. Long, Secretary of the Navy.

12 On April 17, 1901, the Secretary of the Navy directed to the claimant's counsel the following letter:

NAVY DEPARTMENT,
WASHINGTON, *April* 17, 1901.

GENTLEMEN: Referring to your letter of the 15th instant, inclosing a final release executed by the William Cramp & Sons Ship and Engine Building Company, under the contract for the construction of the *Alabama*, I have to state that the proviso inserted in the last

paragraph of your letter, that nothing therein contained shall operate as a waiver of the company's right to sue in the Court of Claims for alleged damages arising from delays and defaults on the part of the Government during the construction of said vessel, is not acceptable to the Department.

After consideration of the matters set forth in your letter, and the discussion of the subject between Mr. Hayden, of your firm, and the Judge-Advocate-General, the Department will accept a release from said company drawn in accordance with the form forwarded to the contractors in its letter, No. 2553, of the 9th instant, with the following provision, which, excepting the substitution of "claims" for "rights," is substantially what was suggested by Mr. Hayden, namely: "*Provided*, That this release shall not be taken to include claims arising under the said contract other than those which the Secretary of the Navy had jurisdiction to entertain."

Upon receipt of release properly executed in form as indicated herein, vouchers in favor of the William Cramp & Sons Ship and Engine Building Company will be approved for payment of the balances due under the contract less the $20,000 contemplated by said release.

The release received with your letter is herewith returned.

Very respectfully,

JOHN D. LONG, *Secretary*.
S. C. L.

Messrs. McCammon & Hayden, No. 1420 F Street N. W., Washington, D. C.

XVI.

On April 20, 1901, the claimant, by its counsel, directed the following letter to the Secretary of the Navy:

WASHINGTON, D. C., *April* 20, 1901.

SIR: We send you herewith a final release executed by the William Cramp & Sons Ship and Engine Building Company, under the contract for the construction of the *Alabama*. This contains a clause which excepts from the operation of the release claims arising under the contract which you, as Secretary of the Navy, had not jurisdiction to entertain, the clause being the one set out in your letter of the 17th instant.

Very respectfully, McCAMMON & HAYDEN.

To the Honorable the Secretary of the Navy.

43 The following release was transmitted with the foregoing letter:

RELEASE.

Under Contract Dated September 24, 1896, with the William Cramp and Sons Ship and Engine Building Company for the Construction of Battle Ship No. 8, the "Alabama."

Whereas by the eleventh clause of the contract dated September 24, 1896, by and between the William Cramp and Sons Ship and Engine Building Company, party of the first part, and the United States, party of the second part, for the construction of battle ship No. 8, the *Alabama*, it is agreed that a special reserve of sixty thousand ($60,000) dollars shall be held until the vessel shall have been finally tried, provided that such final trial shall take place within five months from and after the date of the preliminary acceptance of the vessel; and

Whereas by the seventh paragraph of the nineteenth clause of said contract it is further provided that when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said special reserve, or the surplus, if any, of the said reserve fund, or so much of either as the said party of the first part may be entitled to, on the execution of a final release to the party of the second part, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract; and

Whereas said vessel was preliminarily accepted on the 22nd day of October, 1900, and her final trial completed March 11, 1901; and

Whereas all the conditions, covenants, and provisions of said contract have been performed and fulfilled by and on the part of the party of the first part, excepting certain minor defects, deficiencies, and items of uncompleted work, to cover which the sum of twenty thousand dollars is, according to an understanding between the respective parties to said contract, and as stated in the letter dated April 9, 1901 (No. 2919-01), of the Secretary of the Navy to the parties of the first part, to be withheld by the party of the second part until the completion of the vessel in said respects; and

Whereas owing to the inexpediency at this time of keeping the *Alabama* at a navy yard long enough for the doing of the work in question, the party of the second part has consented to pay to the parties of the first part all balances due under said contract, excepting the said special reservation of twenty thousand dollars:

Now, therefore, in consideration of the premises, the sum of forty thousand dollars ($40,000), the amount of the aforesaid special reserve less the above-mentioned reservation of twenty thousand dollars ($20,000), being to me in hand paid by the United States, represented by the Secretary of the Navy, the receipt whereof is hereby acknowledged, the William Cramp and Sons Ship and Engine Building Company, represented by me, Charles H. Cramp, president of said company, does hereby, for itself and its successors

and assigns and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever in law and in equity, for or by reason of or on account of the construction of said vessel under the contract aforesaid, excepting the sum of twenty thousand dollars, withheld by the Secretary of the Navy as above set forth:

44

Provided, That this release shall not be taken to include claims arising under the said contract other than those which the Secretary of the Navy had jurisdiction to entertain.

In witness whereof the William Cramp and Sons Ship and Engine Building Company has caused its corporate name to be hereunto subscribed and its corporate seal to be affixed this nineteenth day of April, 1901, by Charles H. Cramp, its president.

[Seal of the William Cramp and Sons Ship and Engine Building Co.]

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY.
By CHAS. H. CRAMP, *President*.

Attest:

CHAS. T. TAYLOR, *Secretary*.

On April 20, 1901, the Judge-Advocate-General, by direction of the Secretary of the Navy, directed the following letter to claimant's counsel:

NAVY DEPARTMENT,
OFFICE OF THE JUDGE-ADVOCATE-GENERAL,
WASHINGTON, *April* 20, 1901.

GENTLEMEN: The final release by Messrs. Cramp & Sons under the contract for the *Alabama*, received with your letter of this date, and the patent guaranty by the same company previously received, have been approved by the Department.

By direction of the Secretary:

Very respectfully,

SAM. C. LEMLY,
Judge-Advocate-General.

Messrs. McCammon & Hayden, No. 1420 F Street N. W., Washington, D. C.

XVII.

The last payment on account of battle ship No. 8, "*Alabama*," was made on or about August 26, 1901, as set forth in the following voucher:

Quadruplicate. No. 8938 E. 96.

The U. S. Navy Department to Wm. Cramp and Sons Ship and Engine Building Company, Dr.

Appropriation, Increase of the Navy, "Construction and Machinery."

	Battleship No. 8, "Alabama." Date of contract, September 24, 1896.	
Aug. 26, 1901	For amount withheld on vouchers of April 20, 1901, the vessel having been finally accepted	$20,000.00
	Less:	
	Deductions for uncompleted work on hull and machinery (as per statement of items attached) as follows:	
	On hull $832.53	
	On machinery 357.08	
		1,189.61
	Amount payable	18,810.39

45

NAVY DEPARTMENT,
WASHINGTON, D. C., *August* 26, 1901.

We hereby certify that this bill is correct.

DARIUS GREEN,
Acting Chief of Bureau of Construction and Repair.
J. D. B.
GEO. W. MELVILLE,
Engineer in Chief, U. S. N.,
Chief of Bureau of Steam Engineering.

NAVY DEPARTMENT, WASHINGTON, D. C.

Approved for the sum of eighteen thousand eight hundred and ten and 39 100 dollars, payable by purchasing pay officer at Philadelphia, Pa

F. W. HACKETT,
Acting Secretary of the Navy.

Received, ——, 190—, of ——————, at ——, —— dollars in full of the above bill

Statement of Items Chargeable to Contractors on Account of Work Done and Materials Furnished at the Navy Yard, New York, to be Deducted on Vouchers for Final Payment.

On Hull.

	Labor.	Material.	Total.
Replacing cast-iron eccentric straps of boat crane engines with composition straps	$118.20	$35.35	$153.55
Replacing all faulty securing bolts for side lights and supplying three dozen extras	153.40	23.64	177.04
Refitting and stiffening sponson shutters of forward 6-inch guns on main deck	384.40	117.54	501.94
	656.00	176.53	832.53

On Machinery.

Lining up starboard H. P. engine	$47.80	$1.67	$49.47
Repairing auxiliary starboard discharge pipe in each engine-room	26.00	91	26.91
Placing stop valve in ice-machine system	128.64	39.83	168.47
Making stop valve at upper end of steam pipe to auxiliary feed pumps accessible from fireroom floor	26.56	11.60	38.16
Fitting salinometer pots for evaporators	5.60	42.95	48.55
Covering steam pipes	24.32	1.20	25.52
	258.92	98.16	357.08

Hull	$832.53
Machinery	357.08
Total	1,189.61

46 XVIII.

By reason of the said several failures and delays of the United States with respect to the furnishing of the armor for the said battleship, and the delay in her completion and difficulties experienced in her construction consequent thereon, the claimant was put to extra expense in the performance of the contract in suit, and sustained damage to the amount of $49,792.66. The items of the said extra expense and damage were as follows:

Wharfage: September 24, 1899, to October 16, 1900—387 days at $600 per month, including watching		$7,740.00
Electric lighting—Illuminating vessel 348 days during the above period, at $46.12		16,049.76
Painting—Touching up and repainting water bottoms, trimming tank, cofferdams, boiler rooms, dynamo rooms, engine rooms, woodwork, military masts, outside of hull, and cork painting throughout ship, and turpentining decks:		
5,000 hours painting, at 30.4 c.	$1,520.00	
3,825 lbs. red-lead oil, at 10 c.	382.50	
1,750 lbs. color, at 12 c.	210.00	
6 gals. hard oil, at $3.75	22.50	
10 gals. varnish, at $3.02	30.20	
4,120 lbs. turpentine, at 6 c.	247.20	
16 bags sawdust, at 25 c.	4.00	
		2,416.40
Keeping ship clean from snow and ice, removing débris, and general attendance and sealing:		
25,829¾ hrs., laborers, at 13.1 c.		3,383.69
Covers—Canvas over hatches, ventilators, and turrets:		
1,230 lbs., at 15 c.		184.50

(Pp. 92-93.)

Running heaters to heat ship:		
5,420 hrs., machinists, at 28 c.		1,517.60
Turning over dynamo, steering, boat crane, ice machine, and windlass engines, galley, ranges, and blower, and other machinery in hull specifications:		
5,855 hrs., machinists, at 28 c.	$1,639.40	
5,855 hrs., helpers, at 16.1 c.	942.66	
		2,582.06
Running air machines at night in order to obtain pressure to cut armor bolt holes; extra time which would not have been necessary had the armor arrived in time to carry on the work properly:		
820 hrs., machinists, at 28 c.	$229.60	
240 hrs., helpers, at 16.1 c.	38.64	
		268.24
Tearing out scupper pipes and putting in place again to allow armor to go on. Had the scuppers not been in place the ship would have been damaged by water; it was necessary, therefore, to install the scuppers before the armor arrived:		
4,000 hrs., machinists, at 28 c.	$1,120.00	
870 hrs., helpers, at 16.1 c.	140.07	
960 hrs., pattern makers, at 30.6 c.	293.76	
800 ft. lumber, at 10 c.	80.00	
		1,633.83
Turning ship to avert magnetic polarization:		
Towboat service	$75.00	
180 hrs., riggers, at 18.5 c.	33.30	
6 hrs., locomotive cranes, at $3.	18.00	
174 men were working on the ship whose time was lost, but who were paid, through air and electric-light connections being disconnected for two hours, each averaging 20 c. per hour, or	69.60	
		195.30
Towboats' service, breaking ice around ship		15.00
47		
Insurance:		
Cancellation value of policies in force September 23, 1899	$3,764.16	
Renewals of insurance evidenced by said policies paid between September 24, 1899, and October 16, 1900	6,053.20	
	9,817.36	
Deduct cancellation value of said policies returned to claimant October 16, 1900	2,027.04	
		7,790.32

Maintenance and up-keep of propelling machinery:

September, 1899—Overhauling fire-room blowers, cleaning boilers, running temporary steam pipes, cleaning feed-tanks and running pumps subsequent to 24th 111

October, 1899—Examining and lubricating cylinders and pistons, running temporary bilge suction pipe, lubricating and greasing circulating pumps, overhauling fire-room blowers, and tightening up fire-main joints 1,032

November, 1899—Cleaning condenser tubes, overhauling engine-room blower, rejointing fire-main pipe, adjusting main bearings, cleaning boilers, running water-boat suction, overhauling drains from fire-room blowers, running pumps and examining water service pipe and valves 221

December, 1899—Overhauling cross-head brasses, fitting up temporary boilers for heating, running suction pipe from temporary tank, running temporary heater pipe, overhauling piston rod packing, running temporary steam pipe, lubricating air and feed pumps, and cleaning boilers 237

January, 1900—Conducting temporary steam pipe to stern tubes, getting boilers ready for steam, greasing pumps, examining piston rods and valve stem packing, bracketing extension levers on temporary suction, donkey-man on temporary boiler, bleeding auxiliary feed pipes, and putting covers on temporary boiler 301

February, 1900—Drilling for and running water boat suction, donkey-man on temporary boiler, running pumps, cleaning feed tanks, putting fish oil in boilers and stacks, fish oiling tubes, renewing auxiliary steam joints, and cleaning back connection in boilers 438

March, 1900—Overhauling cross-head guides and slippers, running temporary steam pipe, putting fish oil in boiler tubes, running pumps, overhauling crank shaft, donkey-man, watchman, overhauling crank pins, running water boat suction, firing temporary boiler, cleaning and greasing machinery, repacking valves in fire-room, assembling and adjusting guides 625

April, 1900—Overhauling packing in piston stuffing boxes, disconnecting temporary boiler, running pumps, overhauling guides, connecting temporary steam pipes, cleaning and greasing machinery, overhauling blowers, examining and adjusting suspension links, overhauling stop valve gear, donkey-man 318

May, 1900—Running pumps, pumping bilge, donkey-man, rejoining auxiliary steam valves, cleaning boilers, disconnecting and removing temporary steam pipe, examining feed pump pistons, overhauling auxiliary feed pumps, overhauling fire and bilge pumps, overhauling main feed pumps, examining McComb strainers, examining sanitary pumps, cleaning and greasing machinery, examining bilge suction plugs, overhauling thrust bearing water service, rejointing boiler drain pipe, overhauling lubricators, overhauling safety valve gear		243.98
June, 1900—Adjusting turning engine, running pumps, donkey-man, overhauling bilge suction plug cocks, rejointing auxiliary feed drains, overhauling drains from dynamo-rooms, overhauling joints, steam to crane, rejointing auxiliary steam and exhaust pipes		174.31
July, 1900—Donkey-man, running pumps, overhauling and rejointing steam to deck machinery, getting boilers ready for steam, overhauling boilers, turning machinery		200.98
48		
August, 1900—Donkey-man, engineer, rejointing auxiliary steam drains, cleaning and greasing machinery, examining main and auxiliary steam joints, running blowers and pumps, overhauling steam gauge system, rejointing boiler manhole plates, overhauling oil service, tightening joints in water bottom, oil stowing pistons, tightening manhole covers, tightening joints on cylinders, examining pistons, cleaning boilers, examining valve chests, examining pumps		541.40
September, 1900—Cleaning boilers, donkey-man, engineer, cleaning and greasing machinery, tightening main auxiliary steam and exhaust joints		980.84
October, 1900—Cleaning boilers, donkey-man, engineer, running pumps, cleaning and greasing machinery to Oct. 16, 1900, inc		329.84
350 tons bituminous coal, at $3	$1,050.00	
424 gals. fish oil, at 45 c	190.80	
156 gals. lubricating oil, at 60 c	93.60	
200 lbs. waste, at 6 c	12.00	
		1,346.40
Total		50,882.91
Less overcharge on labor of machinists in maintenance and up-keep of propelling machinery, 15,575 hours, at 7 cents per hour		1,090.25
Making a total of		49,792.66

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the petition be dismissed and judgment ordered for the defendants under the authority of the case of *United States v. Wm. Cramp & Sons, etc.* (206 U. S., 118).

Opinion.

Per Curiam:

The contract in this case, respecting the language of the final release upon the completion of the vessel and the payment of the reserve therein mentioned, is the same as in the case of *United States v. Cramp and Sons* (206 U. S., 118), wherein the court said:

"The sixth clause of this paragraph makes special provision for the last payment, to be made 'when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part,' and 'on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract.' Evidently the parties contemplated and specially provided by this stipulation that the whole matter of the contract should be ended at the time of the final release and the last payment. That which was to be released was 'all claims of any kind or description under or by virtue of said contract.' Manifestly, included within this was every claim arising not merely from a change in the specifications, but also growing out of delay caused by the Government. The language is not alone 'claims under,' but 'claims by virtue' of the contract—'claims of any kind or description.' All the claims for which allowances were made in the judgment of the Court of Claims come within one or the other of these causes. It may be that, strictly speaking, they were not claims under the contract, but they were clearly claims by virtue of the contract. Without it no such claims could have arisen.

49 Now, it having been provided in advance that the contract should be closed by the execution of a release of this scope it can not be that the company, when it signed the release, understood that some other or lesser release was contemplated. It must have understood that it was the release required by the contract—a release intended to be of all claims of any kind or description under or by virtue of the contract, and that the form of words which the Secretary had approved was used to express that purpose. * * * It is only by reason of the performance of the contract in the construction of the vessel that these claims arise. But for the contract, and the construction of the vessel under it, there would be no such claims. * * * If parties intend to leave some things open and unsettled their intent so to do should be made manifest."

That language evidently has reference to the contract and its requirements and therefore when the contract in terms provides that the reserve or final payment will be made "when all the conditions,

covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part," the claimant was, upon such payment, obligated to sign the release provided by the terms of the contract releasing the Government from "all claims of any kind or description under or by virtue of said contract." And, since the court in the case cited holds that the release of all claims growing out of the construction of the vessel—without which such claims would not have arisen—was a recognition of the contract and settled, as the court says, "all disputes between the parties as to claims sued upon"—including unliquidated claims—the Secretary of the Navy in respect thereto not only had the right to accept such release in the interest of the Government, but under the contract it was his duty to do so.

Therefore it must be held that, when the vessel was completed and the reserve paid, the rights of the parties were determined by the contract itself and not the language of the release. It follows that on the authority of the case cited the petition must be dismissed, which is accordingly done, and judgment is ordered to be entered for the defendant.

50 V.—*Judgment of the Court.*

No. 22535.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY

vs.

THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 3d day of February, 1908, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants, and do order, adjudge and decree that the petition of the claimant, The William Cramp & Sons Ship and Engine Building Company be, and the same is hereby dismissed.

BY THE COURT.

51 VI.—*Application for, and Allowance of, Appeal.*

No. 22535.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, Claimant,

vs.

THE UNITED STATES.

From the judgment rendered in the above entitled cause on the third day of February, 1908, in favor of the defendant, the claimant, by its attorneys, on February 4, 1908, makes application for

and gives notice of an appeal to the Supreme Court of the United States.

McCAMMON & HAYDEN,
Attorneys for Claimant.

Filed February 4, 1908.

FEBRUARY 5, 1908.

Ordered that the above application for appeal be allowed as prayed for.

BY THE COURT.

52 VII.—*Certificate.*

In the Court of Claims.

No. 22535.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law; of the opinion of the Court; of the judgment of the Court dismissing the petition; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 21st day of February, 1908.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

Endorsed on cover: File No. 21,054. Court of Claims. Term No. 306. The William Cramp & Sons Ship and Engine Building Company, appellant, *vs.* The United States. Filed March 3d, 1908. File No. 21,054.

15

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 92.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, Appellant,

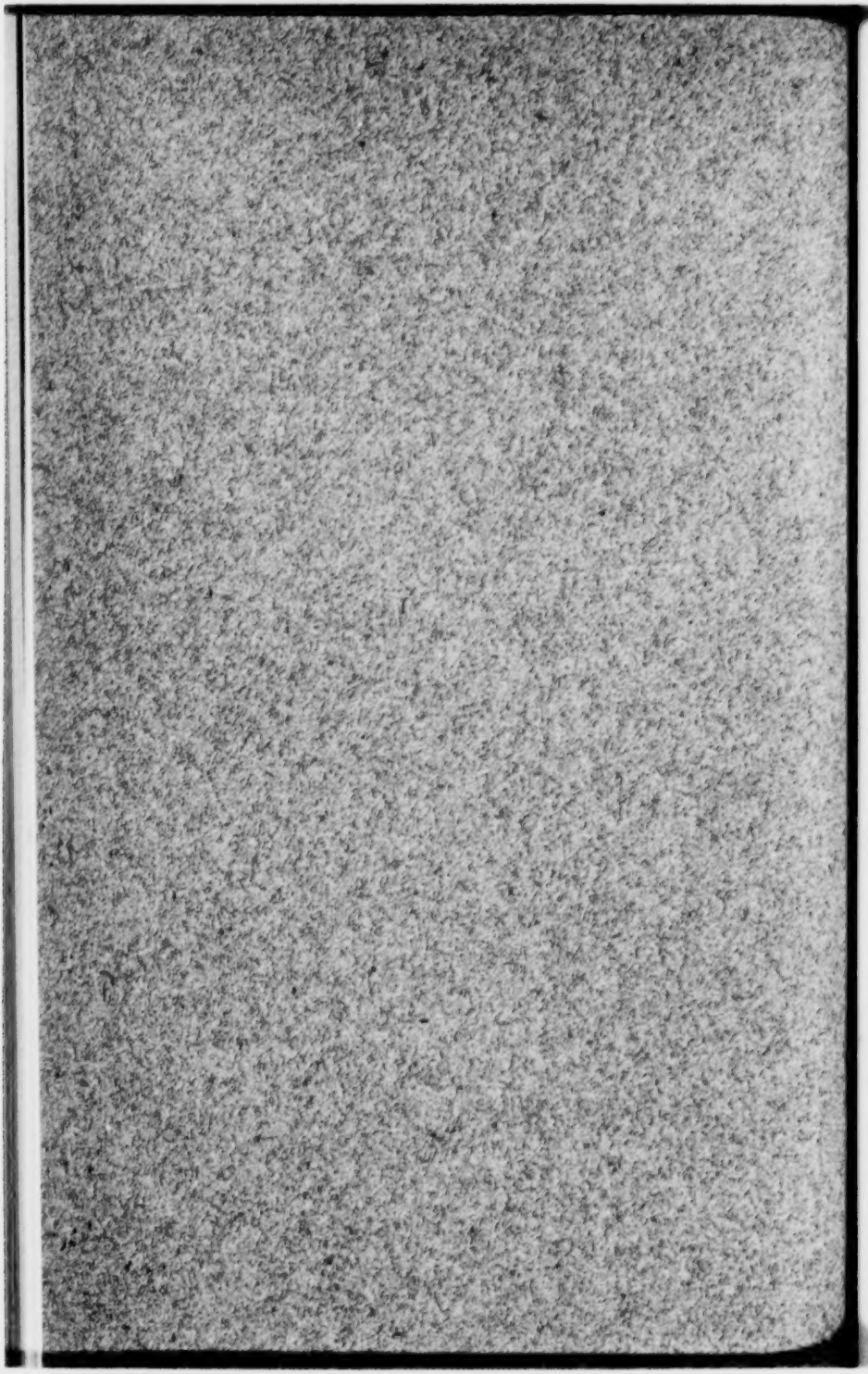
vs.

THE UNITED STATES.

BRIEF FOR THE APPELLANT.

JAMES H. HAYDEN,
ROBERT C. HAYDEN,
Of Counsel for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 92.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This is an appeal by the Cramp Company, claimant below, from the judgment of the Court of Claims, dismissing its petition (pp. 35-36). The claim in suit is for breach of contract. The contract was entered into by the claimant and the United States, represented by the Secretary of the Navy, on September 24, 1896. It related to the construction of a battleship, now known as the U. S. S. "Alabama." The claimant undertook: to provide all material, to be used in the construction of the vessel, except certain armor plate; to construct her in conformity with certain laws, specifications and plans; that she should meet certain requirements; and to deliver her to the United States, complete in all respects, within three years from the date of the contract; also to keep the vessel and all materials provided for use in her construction, insured for the benefit of the Secretary of the Navy, against loss or damage by fire and other risks, up to the time of her delivery to the United

States. In consideration of this the United States assumed two independent obligations: (1) To furnish part of the armor to be used in the construction of the vessel, more particularly described as all "such as may be required in the construction of the side and diagonal belts, turrets, barbettes, casemates, conning towers, ammunition tubes, and protection for the guns and loading positions," and to "deliver said armor and armor bolts at the ship yard of the party of the first part (Cramp Company) within the times and in the order required to carry on the work properly." (2) To pay the Cramp Company the sum of $2,650,000; this being made payable in thirty instalments, some of which were to be paid as the work progressed, some upon the delivery and preliminary acceptance of the vessel, and the balance, including a special reserve of $60,000, upon the vessel's final acceptance and the execution by the builders of a release to the United States "in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract" (p. 14). Final acceptance was not to occur until the vessel should have been in the actual service of the Government not exceeding five months. It was stipulated: (1) If the delivery of the vessel should be delayed, beyond the expiration of the building period of three years, the builder would become liable for liquidated damages to be deducted from its compensation, unless such delay were caused by act of the United States, or by certain other circumstances beyond the builder's control. (2) The builder was required to submit all questions with regard to delays to the Secretary of the Navy and his decision as to their cause and extent was made binding upon both parties; (3) In case the Secretary should find that the builder's work was being delayed by acts of the United States or its officers or agents, the builder was to be allowed "a corresponding extension of the building period" (pp. 4-15, 21, Finding II).

Upon the execution of the contract the claimant made all preparations necessary for the commencement of the work, undertaken. On December 2, 1896, the vessel's keel was laid and thereafter her construction progressed with due dispatch, and she would have been completed and ready for delivery within the contract period if the United States had delivered her armor as and in the manner undertaken by it (p. 21). By the middle of February, 1898, the construction of the vessel had progressed to a point where it became necessary for the builders to have her internal armor, in order that work upon her might proceed properly. This was a portion of the armor that the Government had agreed to furnish. It was to constitute part of her structure in the same sense as her keel and frames. The first instalment of it was not delivered to the builders until December 22, 1898, and the last instalment was not delivered until March 11, 1899. Notwithstanding the hindrance and embarrassment caused by the lack of the internal armor, the builders proceeded with their work as rapidly as possible in so far as it could be done at all (p. 21). On May 18, 1898, the vessel was launched. According to the official estimate, the contractor's work was then about fifty-five per centum completed (p. 22). On June 9, 1898, over twenty months after the execution of the contract in suit and nearly four months after the lack of internal armor began to delay the builder's work on the vessel, the United States entered into a contract with the Bethlehem Iron Company by which the latter agreed to manufacture and deliver certain armor, including that which the Government had undertaken to provide for the "Alabama," deliveries of the armor to begin in December, 1898. The Cramp Company had nothing to do with that contract, nor was it apprised by the contract in suit of the manner in which the Government would procure the armor which it undertook to contribute. The Government had given no order for that armor, nor

taken steps to procure it, before June 9, 1898. In his report, dated June 30, 1898, the Navy Department's representative at the Cramp Company's ship-yard, said:

> "It is estimated that on June 30, 1898, the vessel ("Alabama") was 60 per cent completed. The contractor's trial, final completion and delivery of the vessel to the Government *will depend entirely upon the delivery of the armor* and armament, and the ship should be ready for final delivery to the Government within two months after the receipt of the armor and armament at the shipbuilding yard."

He stated further that the probable date of the vessel's completion was September 24, 1899, provided that all of her armor were delivered *without undue delay* (p. 22).

After launching, in order that work upon the vessel might proceed in due course, it became necessary for the contractor to have certain parts of her external armor. This was not delivered until much later, nor were the deliveries of armor of the several classes made in the order necessary to carry on the work properly. The first instalment of external armor was delivered on April 5, 1899, and the last of them, as late as June 7, 1900—eight and a half months after the date fixed by the contract for the completion of the vessel and her delivery to the Government. Armor for the turret, aft, was delivered in April, 1899, while that for the forward turret was not delivered until over a year later. Again the last of the armor for the side or main belts was not delivered until November 10, 1899, or six weeks after the expiration of the building period. This latter delay had the most detrimental effect upon the progress of the work, for the armor being heavy and designed to be submerged in part, a great amount of material intended for the internal fittings of the vessel could not be installed at all, since its weight would have sunk her too deep

to admit of the subsequent installation of the main belts (p. 22). In his report of June 30, 1900, the Navy Department's representative at the Cramp's shipyard said of the "Alabama":

> "The vessel is at present estimated to be 97 per cent completed. I estimate that the date of the official trial can be about August 15, 1900, and that the ship will be ready for commissioning by the 30th of September, 1900."

From June 7, 1900, when the last instalment of armor plate was delivered, the work of finishing and testing the vessel was prosecuted with all possible dispatch. Her official trial was held on August 20, 1900, and she was delivered to the Government and placed in commission on October 16, 1900. On October 31, the Secretary of the Navy issued an order to the effect that the vessel's preliminary acceptance should date from October 22, and that the building period should be extended until that date (p. 23, Finding XIV). In July of 1899 a strike occurred among the workmen of the Cramp Company's yard, but it had no effect upon the progress of work upon the "Alabama" (p. 23, Finding XI). The whole delay of more than a year (387 days) was attributable to the United States, and the inevitable consequence of its failure to provide armor plate for the vessel, as agreed. Such was the finding of the Secretary of the Navy, by whom the cause and extent of the delay was inquired into and determined in the manner provided by the contract (Paragraph 9th) which made his decision of such matters conclusive upon the parties (pp. 23-24, Finding XIV). While this finding of the Secretary is not now open to dispute it is noteworthy that the Government's delay of over twenty months in placing an order for the armor accounts for the delay, in the deliveries of the armor, and the hindrance

of work and damage of which the ship-builder complains. By reason of the Government's breach of contract in failing to provide armor plate for the vessel in due season, the Cramp Company was put to extra expense in the performance of the contract on its part, and suffered damage, which the Court of Claims has assessed at $49,792.66. This was made up of items covering (1) the wharfage, maintenance and upkeep of the vessel, and insurance carried upon her as required, *during the delay period;* (2) the cost of extra work made necessary by the delay; and (3) the increased cost of doing certain of the work specified by the contract because of the lack of armor, when needed (pp. 30-33).

On February 9, 1901, after the delivery of the vessel to the United States and her preliminary acceptance, but before final acceptance, the Cramp Company wrote to the Secretary of the Navy, presenting its claim for the damage suffered by it, in consequence of the Government's default, estimating this at $66,973.23. On February 13, 1901, the Secretary replied:

> "* * * while from a casual consideration of the matter it might seem proper that the papers (particulars of demand) should be referred to the bureaus concerned for examination and report, *it appears after careful consideration of the subject, that the* CLAIM, *being for* UNLIQUIDATED DAMAGES, IS OF A KIND THAT THE DEPARTMENT HAS NO AUTHORITY IN LAW TO ENTERTAIN."

On March 11, 1901, the Department, having completed the final trial of the vessel, the Secretary notified the Cramp Company of her final acceptance. Along with this notice he sent the company a form of final release and said that a part of the special reserve, amounting to $40,000, would be

paid to the company upon the return of that release duly executed. This draft release read:

"Whereas, by the eleventh clause of the contract, dated September 24, 1896, by and between the William Cramp and Sons Ship and Engine Building Company, party of the first part, and the United States, party of the second part, for the construction of battleship No. 8, the "*Alabama*," it is agreed that a special reserve of sixty thousand ($60,000) dollars *shall be held until the vessel shall have been finally tried*, provided that such final trial shall take place within five months from and after the date of the preliminary acceptance of the vessel; and

"Whereas, by the seventh paragraph of the nineteenth clause of said contract it is further provided that when all of the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said special reserve, or the surplus, if any, of the said reserve fund, or so much of either as the said party of the first part may be entitled to, on the execution of a final release to the party of the second part, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract; and

"Whereas, the said vessel was preliminarily accepted on the 22d of October, 1900, and her final trial completed March 11, 1901; and

"Whereas all the conditions, covenants, and provisions of said contract have been performed and fulfilled by and on the part of the party of the first part, excepting certain minor defects, deficiencies and items of uncompleted work, to cover which the sum of twenty thousand dollars is according to an understanding of the parties to said contract, and as stated in the letter dated April 9, 1901 (No. 2919-01) of the Secretary of the Navy to the parties of the first part, to be with-

held by the party of the second part until the completion of the vessel in said respects; and

Whereas, owing to the inexpediency at this time of keeping the "Alabama" at a navy yard long enough for the doing of the work in question, the party of the second part has consented to pay to the parties of the first part all balances due under said contract, excepting the said special reservation of twenty thousand dollars;

"Now, therefore, in consideration of the premises, the sum of forty-thousand dollars ($40,000), the amount of the aforesaid special reserve, less the above-mentioned reservation of twenty thousand dollars ($20,000) being to me in hand paid by the United States, represented by the Secretary of the Navy, the receipt whereof is hereby acknowledged, the William Cramp and Sons Ship and Engine Building Company represented by me, Charles H. Cramp, president of said company, does hereby for itself and its successors and assigns, and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claim and demands whatsoever in law and in equity for or by reason of or on account of the construction of said vessel under the contract aforesaid, excepting the sum of twenty thousand dollars, withheld by the Secretary of the Navy as above set forth."

The Cramp Company being advised that such an instrument would bar its right to assert and collect its claim for damages, declined to execute a release in that form, but, on April 15, 1901, tendered to the Secretary one in all respects like his draft, except that it contained this additional proviso, designed to save the company's right of action on the claim in suit (p. 25):

> *"Provided, that nothing herein shall operate as a waiver of the company's right to sue for and recover judgment in the Court of Claims for damages incurred or losses sustained by the company in the prosecution of the contract work, which were occasioned by delays or defaults on the part of the United States."*

This was tendered by counsel for the Cramp Company along with a letter in which they showed that the company wished to preserve its right to collect the claim in suit, and was not willing to relinquish it in the manner contemplated by the Secretary's draft of the release. They suggested further that inasmuch as the Secretary had declined to entertain the claim on the ground that he lacked authority to do so, and was sustained in that position by numerous decisions of the Court of Claims, holding that the head of an executive department is not vested with jurisdiction to hear and determine claims for unliquidated damages, the company was constrained to seek its remedy by suit in the Court of Claims, as provided by the act of Congress, approved March 3, 1887, and known as the "Tucker Act." On April 17, 1901, the release thus tendered was returned to counsel by the Secretary with a letter in which he said that the proviso, added by the company, was not acceptable to the Department, but that the Department would accept a release containing a proviso, "which, *excepting the substitution of 'CLAIMS' for 'RIGHTS,' is substantially what was suggested by Mr. Hayden, namely: 'Provided, that this release shall* NOT *be taken to include* CLAIMS *arising under the said contract,* OTHER THAN THOSE WHICH THE SECRETARY OF THE NAVY HAD JURISDICTION TO ENTERTAIN.'"

On that representation, the Cramp Company executed a release containing this proviso, suggested by the Secretary, and it was tendered to the Department by counsel, on April 20, 1901, with a letter in which they said:

> "This (release) contains a clause *which excepts from the operation of the release claims arising under the contract, which you, as Secretary of the Navy, had not jurisdiction to entertain.*"

In that form the release was accepted (p. 28) and the sum of $40,000 was thereupon paid to the Cramp Company. This suit was brought on April 29, 1901 (p. 1). On August 26, 1901, the Department accounted to the company for the sum of $20,000, withheld, pending the completion by the Government of a few minor items of work. The cost of these came to $1,189.61., and the balance of the contract price—$18,810.39—was paid to the company and receipted for as follows:

> "For amount withheld on voucher April 20, 1901, the vessel having been finally accepted, less deductions for uncompleted work on hull and machinery (as per statement attached) as follows:"

No further release or voucher was called for by the Department or given by the Company (pp. 28-30). After hearing, the Court of Claims dismissed the petition and entered judgment for the defendant (p. 34), holding: (1) that under the contract the Government became entitled to a release of all claims that might have accrued to the Cramp Company for the Government's breach of contract on payment of the special reserve, and that the contract itself had the effect of a release; (2) that the acceptance of the special reserve barred the company's right of action, although it was paid with the understanding, expressed in the release, that it should not operate against claims that the Secretary had not authority to entertain. The court said that this decision was "under the authority of the case of *United States vs. Wm. Cramp & Sons, etc.* (206 U. S., 118)."

Specification of Errors.

The errors of the Court of Claims, relied upon and intended to be urged are these:

1. The said court erred in dismissing the petition and in entering judgment for the defendant.

2. The said court erred in holding that the claimant was debarred, by the contract in suit, or by the release from asserting and collecting the claim in suit.

3. The said court erred in holding that by acceptance of the last payment made on account of the contract price of the vessel the claimant became debarred from asserting and collecting the claim in suit.

4. The said court erred in failing and refusing to hold that under the terms of the contract the claimant had a right of action for the damages suffered by it in consequence of the defendant's failure to deliver armor for the vessel as covenanted, and that the claim in suit remained open and unsettled, the claimant saving its right of action upon the same.

5. The said court erred in failing and refusing to give judgment for claimant in a sum equal to the damage suffered by it, caused by the defendant's failure to deliver the vessel's armor, as covenanted.

Argument.

In the court below the defendant raised several issues of law, denying the Government's liability. These were founded upon the terms of the contract and those of the release, and upon the acceptance by the claimant of the payments made after final acceptance. As stated above, the court confined its consideration of the case to the supposed bar, created by the contract itself, and the acceptance of the last payment. That question will be taken up first. Afterwards, the other questions, raised below, but not mentioned in the opinion of the court, will be considered.

I.

The contract did not obligate the claimant to relinquish the claim in suit, or any other claims that might accrue to it for breach of the contract by the United States. The contract itself was not a release of such claims. The acceptance by the claimant of the last payment did not create a bar to the claimant's right of action for the breach committed by the United States.

The interpretation of the contract by the court below comes down to this: (1) While the United States, as a consideration on its part to be performed, covenanted to deliver armor plate to the builder for use in the construction of the vessel, when and as the builder should need it, and, independent of and in addition to that, covenanted to pay the builder a certain sum of money; there was another provision of the contract (Paragraph 19, Sec. 7), which made the Government's covenant to furnish armor nugatory, by requiring the builder to relinquish any and all claims that might accrue to it for breach of contract by the Government on receipt of the sum stipulated to be paid. In short, it was held that the Government was relieved of *both* of its obligations by performing *one*, and, from the moment when the contract was signed, the claimant was powerless to compel the Government to perform both obligations, although the two were independent, and together made up the consideration to the builder for the construction of the vessel. (2) Though the Government broke its covenant to deliver armor, it did perform its other and independent covenant to pay a certain sum of money, and the condition as to payment was such that acceptance of the money had the same effect as an unconditional release and precluded the builders from claiming damages for breach of the first covenant, although they gave notice of their claim

before payment of the money, and by the release which was given before payment, the parties left the claim in suit open and unsettled.

Let us see whether there is any justification for placing such an interpretation upon the contract or the conduct of the parties.

The contract, drawn by the Navy Department, was of great length and divided into nineteen paragraphs. Sixteen of these related exclusively to obligations assumed by the builders, including: (1) the provision of materials; (2) the prosecution of work upon the vessel; (3) the time of her completion and delivery; (4) the tests to which she should be subjected and requirements that she would have to meet; and (5) numerous penalties and forfeitures to be imposed upon the builder in the event of failure on its part.

Three of the paragraphs—the third, eleventh, and nineteenth—relate, among other things, to the considerations moving from the Government.

Paragraph "*Third*" deals with the furnishing of the vessel's armor. Certain contingencies provided against in the latter part of this paragraph, and which, had they arisen, might have modified the obligations of both parties, did *not* arise, so we can ignore them and confine our attention to the following: The builder undertook to prepare plans and templates for all of the armor, to supply the plates required for the protective deck, and to install all of the armor upon the vessel. The Government on its part undertook to provide all armor plate other than that required for the protective deck, and to deliver it to the builder "*at the times and in the order required to carry on the work properly.*" These undertakings were not subject to any condition as to the manner in which either party should produce or procure the part of the armor to be contributed by it. The Government's obligation was not made dependent upon or an alternative for any other consideration to be performed by it.

Paragraph "*Nineteenth*" (p. 14) relates to the money consideration: "The price to be paid for the vessel *to be constructed and furnished in accordance with this contract*," was fixed at $2,650,000—to be paid by the Government to the builder in thirty equal instalments with a reservation of ten per centum from each instalment. Twenty-seven instalments were to be paid as the work progressed. The last three were to be paid as provided by Paragraph *Eleventh, and not otherwise* (pp. 10-11), that is to say: they were to be retained by the Government until preliminary acceptance of the vessel, when they were to be paid over to the contractor, subject, however, to a special reserve of $60,000, as to which it was provided:

> "In case of a preliminary acceptance of said vessel, the said *special reserve* of $60,000 * * * shall be held until the vessel has been *finally tried*, after being fully equipped, armored, or weighted correspondingly, and in all respects complete and ready for sea, under conditions prescribed or approved by the Secretary of the Navy; *provided, that such final trial shall take place within five months from and after the date of the preliminary * * * acceptance of the vessel.*"

Paragraph "Nineteenth" also contained this:

> "7. When all the conditions, covenants and provisions of this contract shall have been performed and fulfilled, by and on the part of the party of the first part (Cramp Company), *said party of the first part shall be entitled within ten days after the filing and acceptance of its claim, to receive the said special reserve* or the surplus if any of said reserve fund or so much of either as the party of the second part may be entitled to, *on the execution of a release in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract.*"

These surely do not justify the interpretation that the court below placed upon the contract.

(1) The price stipulated to be paid was "for the *vessel*, to be constructed and furnished *in accordance with this contract*," i. e., the Government supplying all armor other than that for the protective deck and delivering it to the builders *"at the times and in the order required to carry on the work properly."*

(2) The contract (Par. 11th, p. 11; Par. 19th, Sec. 5, p. 14) did not sanction the withholding of the special reserve by the Secretary after *final acceptance* of the vessel, or more than five months after her preliminary acceptance.

(3) Section 7 of paragraph nineteenth (*supra*) was not a *present* release, but, at the utmost, an agreement to release, conditioned upon the performance by the Government of the considerations specified. Performance by the Government of its covenant to supply armor failing, the builder's agreement to release went with it. *"If part of the consideration agreed on be not performed, the whole accord fails."* (*City of Memphis vs. Brown*, 20 Wall., 289; *Bank vs. Leech*, 94 Fed. R., 310; 1 *Smith's Leading Cases*, 5th Am. Ed., 445-446.) In the case of *Bank vs. Leech* (*supra*), Caldwell, J., said:

> "It is a well settled rule of law that accord without satisfaction is not a good answer. An agreement or accord which is to operate as a satisfaction of an existing liability must, before it can have that effect, be fully executed. It is not enough that there be a clear agreement or accord and a sufficient consideration; but the agreement or accord must be executed before it can be pleaded as an accord and satisfaction. If part of the consideration agreed on be not performed, the whole accord fails."

(4) Section 7 of paragraph nineteenth (*supra*) contemplated the presentation of a claim by the Cramp Company for

the part of the money remaining unpaid at the time of the final acceptance of the vessel, an adjustment of the matter with the Secretary, and thereafter a release and payment, based on such adjustment. These things did not occur for obvious reasons. The Cramp Company had presented the claim in suit, over two months before final acceptance of the vessel. The Secretary, without disputing the amount of the claim or the right of the company to recover it, advised the company that "*the claim being for unliquidated damages, is of a kind the Department has no authority in law to entertain*" (p. 24). It was the Secretary who, two months later, after final acceptance of the vessel, and without a request from the Cramp Company, tendered to it a part of the special reserve, saying that it would be paid on the execution of a release which *would have* discharged the United States from all "debts, dues, sum and sums of money, accounts, reckonings, claims and demands whatsoever in law or in equity for or by reason of or on account of the construction of said vessel under the contract aforesaid, *excepting* the sum of $20,000, withheld by the Secretary of the Navy" subject to a further adjustment. The company *declined* to execute that release, because it wished to preserve its right of action on the claim in suit, and so advised the Secretary. It agreed with him in his conclusion that "the claim, being one for unliquidated damages, was of a kind that he had no authority in law to entertain." It told him that it proposed to submit the claim to the Court of Claims, which had authority in law to entertain it. It tendered to the Secretary, in lieu of the release proposed by him, one by which its "*right*" of action on the claim in suit was excepted and left open, as well as its claim for a further adjustment of the $20,000 matter. The Secretary objected to the use of the word "*right*" as applied to the claim in suit. Doubtless he considered that the acceptance of such a release might be taken as his assent to the

proposition that the company had a right of action. He had no authority to concede even that much, and to do so would have been an encroachment upon the jurisdiction, committed by Congress, to the Court of Claims. So he offered to approve a release, which in speaking of the matter excepted from its operation, should describe the company's bill of damages as a "*claim*" rather than a "*right*." He said in effect that such a change of terms would not impair the efficiency of the proviso as a saving clause (p. 26). The company acceded to this proposition and the release executed by it and delivered to the Secretary before payment of any part of the special reserve, in terms, excepted from its operation "*claims arising under the said contract other than those which the Secretary of the Navy had jurisdiction to entertain*"—the very words that had been employed by the Secretary to describe the claim in suit.

The elaborate and tautological expressions contained in the fifth paragraph of the release (pp. 27-28) do not overcome the particular words of limitation, contained in the proviso (p. 28), which limited the operation of the release to claims which the Secretary of the Navy had jurisdiction to entertain.

Texas, etc., R. Co. vs. Dashiell (198 U. S., 521). This case turned upon a release which read:

> "Whereas, on and prior to the 24th day of December, 1900, I, G. H. Dashiell, was employed by the Texas & Pacific Railway Co. as brakeman and extra freight conductor at or near Eastland, Texas, on the said 24th day of December, 1900, about 3.15 o'clock A. M. I sustained certain personal injuries in the manner and of the character described, to the best of my knowledge and ability, to-wit: Extra east eng. 189 struck caboose of extra east eng. 255, 2½ miles east of Eastland, bruising my body, right leg, right arm, and giving me a scalp wound. And whereas, it is by said railway company and myself mutually desirable to maintain

amicable pleasant relations and avoid all controversy in respect to said matter: Now, therefore, to that end, and in consideration of thirty and no/100 dollars, to me now here paid in cash by said Texas & Pacific Railway Company, I hereby release and acquit, and by these presents bind myself to indemnify and forever hold harmless, said Texas & Pacific Railway Company from and against all claims, demands, damages, and liabilities, of any and every kind or character whatsoever, for or account of the injuries and damages sustained by me in the manner or upon the occasion aforesaid, and arising or accruing, or hereafter arising or accruing, in any way therefrom. * * * And it is also expressly understood, that all premises and agreements respecting or in any wise relating to the subject hereof are fully expressed herein and no others are made to exist."

After executing this Dashiell brought an action against the railroad for his personal injuries, enumerating injuries to his head, eyes, back, sides, arms, shoulders, and in the organs and functions of his brain and his mental and nervous systems. The railroad set up the release contending that it was intended "to be a final settlement of all claims growing out of the accident." The defendant contended that it was a settlement only for the particular injuries therein enumerated. The court adopted the plaintiff's view of the instrument and gave judgment in his favor. This was affirmed by the Circuit Court of Appeals and thereafter by this court, where Mr. Justice McKenna, delivering the opinion, said:

> "The words 'in the manner and upon the occasion' are a mere tautological identification of the collision and cause of the injuries. They add nothing else whatever to the meaning of the release. This construction gives purpose to the enumeration of the injuries and to all of the provisions of the release. *And the rule of construction should not be overlooked that general words in a release are to be limited and restrained to the particular words in the recital.*"

(5) The Secretary of the Navy and the Cramp Company were correct in the opinion expressed by the former and acquiesced in by the latter that *"the claim being one for* ***unliquidated damages is of a kind the Department has no*** *authority under the law to entertain"* (p. 24). By the saving clause which was finally included in the release:

> *"Provided, That this release shall not be taken to include claims arising under the said contract other than those which the Secretary of the Navy had jurisdiction to entertain."*

they adopted apt words to carry out their purpose to leave the claim in suit open and unsettled. It is and always has been the law that executive officers of the Government cannot entertain such claims, and it has been held over and over again that the head of an executive department is not authorized to entertain and settle claims for unliquidated damages, even when they grow out of contracts made by him. Such has been and is the rule followed by all executive departments. In an opinion given in 1832 (Opinions, Ed. 1841, p. 882), Mr. Attorney-General Tawney said:

> "If the Navy Commissioners have refused to take the bread from Mr. Stiles, according to contract, when he had prepared it of the quality called for by the agreement, *it is not in the power of the executive branch of the Government to liquidate and pay the damages he may have sustained.* If he has been damnified by the officers of the Government, Congress* alone can redress the injury."

*Since that opinion was written Congress by the act of March 3, 1887, known as the "Tucker Act," has conferred upon the Court of Claims jurisdiction "to hear and determine * * * all claims * * * *for damages* liquidated or *unliquidated, in cases not sounding in tort.*"

See also:

McKee vs. U. S., 12 C. Cls., 514, 555-558;
Power vs. U. S., 18 Id., 263, 275;
McClure vs. U. S., 19 Id., 18, 28-29;
Brannen vs. U. S., 20 Id., 219, 223-224;
Pneumatic Gun Carriage Co. vs. U. S., 36 Id., 71;
4 Opin. Attys.-Genl., 327-328; Id., 627, 630.

In *Power vs. U. S.* (*supra*), Davis, J., delivering the opinion, said (p. 275):

> "Claims for unliquidated damages require for their settlement the application of the qualities of judgment and discretion. They are frequently, perhaps generally, sustained by extraneous proof, having no relation to the subjects of the contract, which are common to both parties; as, for instance, proof concerning the number of horses and the number of wagons, and the length of time that would have been required in performing a given amount of transportation. The results to be reached in such cases can in no just sense be called an account, and are not committed by law to the control and decision of Treasury accounting officers."

(6) Apart from the plain and explicit language of the release, it was clearly understood by the parties that the claim in suit was left open and unsettled, to be adjudicated by the tribunal having exclusive jurisdiction of claims for unliquidated damages. That was the situation of affairs, when the first payment of $40,000 was made from the special reserve. When the $20,000 matter was adjusted, some months later, this suit had been brought and no release whatever, beyond a voucher for the payment, was asked for or given. To give the release or the claimant's acceptance of the last payments the effect claimed for them by the Government and given them by the court below, would be to use them in a way not justified by the terms of the release,

or intended by the parties, and would allow the Government to commit a fraud. (*Parmelee vs. Lawrence*, 44 Ill., 405-409; *Fire Ins. Assn. vs. Wickham*, 141 U. S., 564, 576-582). If the terms of the release were obscure, *which they are not*, it would have to be interpreted in such a way as to carry out the intent of the parties, to be ascertained from the correspondence which passed between them. (*Fire Ins. Assn. vs. Wickham*, 141 U. S., 564, 576-582; *U. S. vs. Peck*, 102 U. S., 64; *Merriam vs. U. S.*, 107 U. S., 437, 441-442; *U. S. vs. Gibbons*, 109 U. S., 200, 203-204; *Chicago, etc., R. Co. vs. Denver, etc., R. Co.*, 143 U. S., 596, 609-610; *Nash vs. Towne*, 5 Wall., 689, 699.) No one can read that correspondence and say that either party intended the release to bar the claimant's remedy on the claim in suit, but on the contrary that both parties intended that it should be preserved.

(7) The Secretary was not precluded from paying the special reserve without requiring the claimant to execute an unconditional release. Take Section 7, Paragraph Nineteenth (*supra*) literally and by itself, without regard to the rest of the contract, or the situation of the parties; or the fact that the Secretary, who made the contract, had authority to modify it, and it would have precluded him from ordering final acceptance of the vessel or from paying any part of the special reserve until "all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by the party of the first part (Cramp Company)." This the company had not done. There remained, as shown by the release itself, "certain defects, deficiencies and items of uncompleted work," to cover the cost of which the Secretary withheld $20,000 pending the completion of these things by the Government at the builder's cost (p. 27). If he had authority to make that exception of a matter which he was authorized to settle, he had, also, authority to make the other exception

with respect to claims that he could not entertain and was obliged by law to leave unsettled, if the contractor refused to relinquish them. The Secretary had legislative authority to make a contract for the construction of the vessel in question, and while this was limited in some particulars it was broad. There was no limitation with respect to the manner of paying the money consideration, or the taking of a release. These things were left to his discretion. He was as free to exercise his judgment in the modification of the contract in these particulars as he was to make the contract in the beginning. (*U. S. vs. Barlow*, 184 U. S., 123; *Salomon vs. U. S.*, 19 Wall., 17; *U. S., ex rel. Redfield, vs. Windom*, 137 U. S., 636.) Mr. Justice McKenna, delivering the opinion of this court, in *United States vs. Barlow*, said (p. 135):

> "It is contended by the United States that the direction of the Secretary of the Navy was a change or modification of the contract within the meaning of the 7th subdivision of the contract, and that the Secretary had no power to direct or consent to such change more than the 'humblest laborer employed upon the work,' and besides, that no such change could be made except by an agreement in writing.
>
> "*We have no doubt of the power of the Secretary of the Navy. His power is manifest from the contract, and is given by law.*"

The acceptance by the claimant of the payments made after final acceptance of the vessel with the understanding acquiesced in by the Secretary, that the payments should not bar the claim in suit, certainly did not create such a bar.

Weeks vs. Rector et al of Trinity Church (56 Appellate Division, N. Y., 195). The contract drawn in question in that case provided for the construction of masonry work in a building to be erected by Trinity Church. It was stipu-

lated that this work should be completed by a certain date, or in default of that, penalty should be imposed upon the contractor. While not expressly provided in the instrument, the implication was that the church would secure the necessary building permit and file the necessary plans, within a reasonable time and so enable the contractor to proceed with his work. This the church neglected to do promptly, and in consequence of the delay the contractor was obliged to suspend on two occasions. He finished the work, however, and was paid the sum named in the contract. Later he brought his action for damages caused by the delay. The lower court dismissed the complaint and gave judgment for the defendant. On appeal that was reversed, the court in general term saying:

> "But it is said that the plaintiff having gone on and finished the work after he had been permitted to do so on the 18th of September, and having received his compensation therefor, waived his right to bring any action for damages because of the failure of the defendant to perform the contract on his part. It appears in the case that it was agreed between the parties that the payment of the contract price should not prejudice the right of the plaintiff to bring this action, but even if that agreement had not been made, the receipt by the plaintiff of the stipulated contract price for the performance of the contract would not operate as a waiver of his right to proceed against the defendant for a violation of its agreement. When the plaintiff was compelled by the act of the defendant to cease work on this building he was not called upon to rescind the contract or to refuse to proceed further with it at the peril of waiving any damages which he might have suffered, but he was at liberty to go on with the work, considering the contract still in force, and when he had finished maintain his action to compel the defendant to pay the increased expense to which he had been put by its act."

(8) The court below erred in saying that this case is governed by the decision of this court in *United States vs. Wm. Cramp & Sons, etc.* (206 U. S., 118), which will be referred to as the "Indiana" case. The two are not comparable for several reasons. (*a*) In the "*Indiana*" *case* the builder did not give notice of its claim for damages until long *after* an unconditional release had been given and the special reserve paid. In the *present case* such notice was duly given *before* release and payment. (*b*) In the "*Indiana*" *case* the release was *unconditional and given without protest.* In the *present case* the release was upon the condition therein expressed, that it should *not* extinguish claims of the class to which the one in suit belongs, nor was the conditional release given, nor was payment of the special reserve made, until the parties had reached an understanding that the claimant should be left free to pursue its remedy on the claim in suit. (*c*) In the "*Indiana*" case suit was not brought until fifteen months after the release was given and the contract closed. In the *present case* suit was brought on the ninth day after the execution of the conditional release and payment of part of the special reserve and four months *before* payment of the balance (pp. 1, 28). (*d*) The points on which the decision of the "*Indiana*" *case* turned are clearly set out in the opinion of this court:

> "This case turns on the *release* executed by the building company. * * * No payment of moneys not due is necessary *to sustain this release.* It is under seal and the contract is itself full consideration. * * * Indeed, the general language of the release itself and the number of words of description in it show that it was the intent of the Secretary of the Navy to have a final closing of all matters arising under or by virtue of the contract. * * * *If parties intend to leave some things open and unsettled their intent to do so should be made manifest.* Here was a contract, involving three

millions of dollars, *and after the work was done, the vessel delivered and accepted, and this release entered, claims are presented amounting to over $500,000. Surely the parties never intended to leave such a bulk of unsettled matters.*"

In the *present case* none of these things occurred. The release was limtied to claims that the Secretary was authorized to pass upon. He said that the claim in suit was *not* one of that class and the claimant agreed with him in that conclusion. He was advised of the nature and amount of the builders claim and knew just what he was obliged to leave unsettled. It is certain that he paid over the special reserve with his eyes open and without any expectation that the conditional release and payment of the special reserve would close the transaction, but on the contrary, with the claimant's assurance that it would bring suit upon the claim. It is to be presumed that the Secretary acted in good faith. Probably the court below in making its decision seized upon an expression contained in the opinion of this court in the *"Indiana" case*, i. e.:

"No payment of moneys not due is necessary *to sustain this release*. It is under seal *and the contract itself is full consideration.*"

That does not mean that the contract which necessarily was made in advance of its breach by the Government and of course before the claim in suit could have accrued, was equivalent to a release of that claim. If an *unconditional* release had been given in the *present* case, the contract itself *would have been "full consideration" for it; but no such release was given and there is nothing to sustain, but the instrument which left the claim in suit "open and unsettled."*

II.

The Government broke the contract, and in consequence of that the claimant suffered damage, and is entitled to recover an amount equal to that damage.

The Government's failure to deliver armor plate as agreed was but a partial failure of the consideration moving from it. When the breach occurred the builder had no means of knowing how long it would continue. When the delay began the vessel was about half completed, and over $1,000,000 must have been paid by the Government on account of the contract price of the vessel. The unfinished vessel was liable to rapid deterioration. It was the builder's right, and obviously it was for the best interest of the United States, as well as its own, to proceed with the work as best it could, complete it, and sue for damages caused by the breach. (*2 Parsons on Contracts*, 679; *Clark vs. U. S.*, 6 Wall., 543; *U. S. vs. Speed*, 8 Wall., 77; *U. S. vs. Behan*, 110 U. S., 338, 344; *Figh vs. U. S.*, 8 C. Cls., 319; *Myeric vs. U. S.*, 33 C. Cls., 1.)

In *Cornwall vs. Henson* (2 Ch 298—1900), Collins, L. J., said (p. 303):

> "The law is clear that the breach of one stipulation does not necessarily carry with it even an implication of an intention to repudiate the whole contract. * * * The farther the parties have proceeded with the performance of the contract, the less likely is it that, by breach of one stipulation by one party, he should intend to declare his incapacity to perform the contract or his intention not to carry it out."

Hudson on Building Contracts (1, p. 303—1907):

> "If the prevention does not go to the root of the whole contract, but merely delays the performance, the contractor does not waive his right to recover damage merely by proceeding with the work."

A.

In the court below the Government contended that, when the Secretary determined that the delay in the completion of the vessel was due to the failure of the Government to furnish armor plate as agreed, and extended the building period, named in the contract, by an interval equal to the delay enforced by the Government, he modified the contract so that it called for the completion of the vessel in something over four years, instead of three years. From that, they argued that the vessel being completed within the time set by the contract, and the armor plate having been delivered to the ship builders soon enough to enable them to complete the vessel within the time required, there was, in contemplation of law, no delay in the delivery of armor, no breach of contract, and, of course, no injury to the builder. That is pure sophistry. On that theory, the Government might have deferred ordering the armor for years, or forever, and if the Secretary kept on extending the Cramp Company's building period, the Government could have left the vessel on claimant's hands indefinitely and still remained blameless. The effort to evade the indisputable fact that the Government failed to perform its undertaking is like the reasoning of the divine who sought to soothe his congregation by saying that, when properly interpreted, the parable of the rich man does not mean necessarily that Dives was confined in a place *designed for* torment, but might, equally well, be taken to mean that he was in a celestial sanitarium, whither he had been taken to be cured of an attack of gout, and being in pain, he spoke of that as a place *of* torment. The Secretary found that the delay in the completion of the "*Alabama*" was attributable to the Government, and caused by its failure to furnish armor plate as agreed. Accordingly acting under the contract (Par. 9th) he ordered preliminary acceptance of the vessel, after the expiration of the building period, and

extended the building period up to the time of delivery. No amount of juggling with terms and phrases can convert this simple admission of responsibility for the delay and recognition of the builder's right to deliver the vessel into a modification of the contract itself. The fact being undisputed that the Government did not deliver armor plate "at the times and in the order required to carry on the work properly" it is no defense to say that the contract was not broken because the armor was delivered in time to enable the builder to complete the vessel within the building period, as extended by the Secretary. That is a *non sequitur*. The contract *allowed* the builder to consume the period of three years in constructing the vessel but did not *require* the builder to do so. If she had been finished in a shorter time the Government would have been obliged to accept her. It would have had no right to require the builder to maintain her after completion, simply because the full building period had not elapsed. The Government's obligation to deliver armor would not have been fulfilled *ipso facto* if the deliveries had been made early enough to enable the builder to complete the vessel in three years. If her construction had progressed without unusual dispatch, but more rapidly than the contract required, and the builder, in order "to carry on the work properly" had needed the armor plate sooner than he got it, the Government would have been guilty of a breach of its covenant.

B.

The Government further contended that by forbearing to take advantage of its own wrong, that is to say, by the omission to impose penalty for its own delay and the extension of the building period, it rendered full satisfaction to the builder for the *damage* suffered on account of the Government's failure to deliver armor plate as stipulated

in paragraph *"Third."* Counsel for the Government based this upon paragraph "Ninth" of the contract and invoked the maxim: *"Expressio unius est exclusio alterius."* The argument was that, inasmuch as the contract provided for the deduction of liquidated damages from the builder's compensation in the event of delay caused by the builder, but, said that if delay were caused by the United States, no such deductions should be made, and that the builder would be entitled to an extension of the building period, it must be presumed that the builder was to have no remedy for breach by the Government except immunity from penalty and continuance of the Government's obligation to receive and pay for the vessel. If such were the law or such the meaning of paragraph ninth, of what use was it to put in the contract, as part of the consideration moving from the Government, the covenant that it should furnish armor when needed by the builder? What value has an obligation, if the obligor can ignore it without liability?

There is nothing in paragraph "Ninth" which deprives the claimant of its right to pecuniary damages. This whole subject is well treated of in a recent work (*Hudson on Building Contracts*, 1907) where it is said (Vol. I, pp. 524-525):

> "Building and engineering contracts, as has already been stated, usually contain provisions for the payment by the builder to the owner of liquidated damages in case of the work's not being completed by a stipulated time. Liquidated damages, stipulated for at a rate for each day or week of delay in completing the works, must begin to run from some definite date. It follows, therefore, that if there is no date in the contract, or if the date in the contract has for some reason ceased to be the proper date for the completion of the works, there is no date from which liquidated damages can run, and, therefore, all right to recover liquidated dam-

ages has gone. In order to meet this contingency, a provision is generally inserted that the architect may grant an extension of time for the completion of the works in case of delay from various causes, such as strikes, lockouts, alterations and additions, etc., and that in case of such extension of time being granted, the builder shall complete within the extended time. This clause, if duly acted upon, fixes another date for completion and the obligation of the builder may then be to complete by that other date; but that other date may for some reason not be the proper date, or, being a proper date, may have ceased to be so, in which case again there is no date from which liquidated damages can run, and, therefore, the right to recover liquidated damages may have gone. For example, the architect may only have power to extend the time for (1) strikes, (2) lockouts, or (3) alterations. If delays take place, for example from the failure of the building owner to give the builder possession of the site on which he has to build, then, in that case, the time for completion in the contract having ceased to be applicable, and there being no power in anyone to fix another date, there is no date from which liquidated damages can run and then again no liquidated damages are recoverable."

Id., p. 531:

"Where there is power to extend time for delays which in fact have taken place, but the power has not been exercised, either within the time expressly or impliedly limited by the contract, or not at all, it follows that the building owner has lost the benefit of the clause, and, if the contract time has ceased to be applicable owing to delays caused by the building owner, there is no date from which penalties can run, and therefore, it would seem, no penalties can be recovered."

Id., pp. 542-543:

"In the event of the employer having hindered the performance of the contract so as to prevent the agreed liquidated damage clause applying, it is doubtful whether he can recover unliquidated damages against the builder. It is concluded by authority that when the parties have agreed upon a liquidated sum as damages the amount of the damages cannot be left to the jury, but the question appears to be undecided whether if the employer cannot recover liquidated damages from any default of his own, he can recover unliquidated damages, and if so how such damages may be assessed. If the employer, in such a case, were permitted to recover unliquidated damages, without any limit to the amount, it might be said that he would be able by his own act to defeat and take advantage of the breach, which he himself had committed, if the unliquidated damages were greater than the liquidated damages. It is submitted that the agreement as to liquidated damages is as much a part of the bargain as any other part of the contract, and that it does not rest with the building owner to change the contract which he has entered into by substituting another term, viz: that if the clause as to liquidated damages should by his own act or default cease to be applicable, then he should be permitted to recover whatever unliquidated damages he could prove. Of course, if the contract has been entirely put an end to by the default of the employer, then the builder can recover on a quantum meruit for work done at reasonable prices and in a reasonable time and the employer can claim damages if the work is not done in a reasonable time."

Id., p. 546:

"Extension of time does not release the employer from damages for delay unless the builder covenants to accept the extension in satisfaction of his claim for damages."

In the present case the parties by their contract liquidated the damage recoverable by the Government for delay attributable to the builder. There was no attempt to liquidate the builder's damage for the Government's failure to supply armor as agreed. The contract made the Secretary the final arbiter to determine two facts: the cause and the extent of delay. Those facts being determined the contract provided under what circumstances the builder should or should not pay liquidated damages and whether the building period should or should not be extended. It was competent to provide, as the contract did, that no damages should be imposed for delay, occasioned without fault of the builder and beyond its control, whether the Government or some other agency were responsible. It was reasonable to discriminate, as the contract did, between delays due to the Government's default and delays arising without fault of the Government or builder. That is: in case delay were caused by the Government it should not benefit by its own wrong, and its obligation to take and pay for the vessel should be continued by a suitable extension of the building period; but if delay were caused without fault of the Government by other agencies beyond the builder's control, such a continuance of the Government's undertaking should not be obligatory—for both parties being innocent of causing the delay it might well be as great a hardship to compel the Government to accept an obsolete type of vessel as to leave her upon the builder's hands. But here we have the cause and extent of the delay determined by the Secretary and aside from that, they are admitted by other agents of the Government and established by uncontrovertible proof. The default was the Government's own and no one else was to blame for it. The builder's immunity from liquidated damages followed as a matter of law, as well as by virtue of the contract. The obligations of both the Government and

the builder were continued by the extension of the building period. The Government argued in the court below that in the absence of a covenant giving the builder a right to recover damages, it did not possess that right. That is preposterous. The right existed not because the contract said so, but because the Government failed to perform the contract on its part and because the contract *did not say that the builder should not have damages for the Government's breach if an extension were granted.*

Stubbings Co. vs. Exposition Co. (110 Ill. App., 210). This action grew out of a contract for glazing and other work upon buildings to be erected for the World's Fair at Chicago. It was stipulated that the contractor would complete it by a certain date. It contained this clause:

> "The sum of $50 per day shall be deducted from the contract price for each day the work is delayed in completion after the specified date. If, however, progress of the work shall be delayed by any cause beyond the control of the contractor, an extension of time may be made by the Chief, but claims for such extension must be made in writing at the time of such delay, and the decision of the Chief thereon shall be final and binding upon both parties."

Three of the items in plaintiff's bill of particulars were for "damages for extra time on account of advance in wages, caused by work not being ready for us to complete as per terms of our contract." The court said:

> "The propriety of an allowance of claims for damages for such delay, when supported by the evidence, has been recognized. Tobey vs. Price, 75 Ill., 645; Church vs. Hearson, 41 Ill. App., 89. And the contractor was not obliged to abandon the work and sue for damages, but had the right to proceed to complete it and then claim damages. * * * It is contended, however, by appellee, that the stipulation in the contracts that if delays are occasioned by other contrac-

tors additional time will be allowed within which to complete the work, by implication means that there is to be no pecuniary compensation on account of damages suffered by such delays. It is conceded that there was delay, and it does not seem to be denied that wages rose in the meantime and that it cost the appellant considerably more on that account to perform its contracts. The provisions of the contract referred to do not purport to authorize the chief to determine what, if any, damages the contractor might suffer from such delay. The question is not as to the amount of extra time to be allowed the contractor. There might be no contention as to such allowance, and yet the contractor might be seriously damaged by a rise in the cost of material and labor, possibly to such an extent as to cause him absolute loss. We are of opinion that the language used in the contract did not submit this question of damages to the decision of the architect or chief."

In the present case we have seen that the law precluded the Secretary of the Navy from entertaining the question of the claimant's damage, and that he refused to entertain the claim in suit on the ground that he had no authority in law to do so.

Nelson vs. Pickwick Co. (30 Ill. Apps., 333). This was an action for breach of a contract by which Nelson, the appellant, had undertaken to do certain painting and glazing on a building which was being erected by the Pickwick Company, appellee. The specifications provided that the work should be completed by a certain date, and that if Nelson failed to do so, penalty at the rate of $25.00 per day should be deducted from his compensation; also, that Nelson should co-operate with the other contractors and arrange to avoid delay. The specifications were in print and the court assumed that all the contractors were bound by like provisions. The contract required the work to be done under the supervision of architects. It reiter-

ated the provision for the deduction of $25.00 per day for each day's delay, but provided:

> "Should delay be caused by other contractors, to the positive hindrance of the contractor hereto, a just and proper amount of extra time shall be allowed by the architects, * * * and in case the said parties shall fail to agree as to the * * * amount of extra time, the decision of the architects shall be final and binding."

Judge Gary delivering the opinion of the court said (pp. 335 *et seq.*):

> "The principal question in the case is, whether this provision for the allowance of extra time by the architects is the only remedy of the appellant when delayed by other contractors. He was so delayed until, by the rise in wages, it cost him $473.20 more than it otherwise would have done to perform his contract. The matter in controversy is, whether he shall recover that sum. There is parol testimony of a promise by the general agent of the appellees, having authority, made to appellant when but a small part of the work was done, and he claimed extra pay as condition of going on with it, that the company would pay the additional cost caused by such delay. But if the rights of appellant were fixed by the contract, any promise to pay him extra for doing what the contract bound him to do would lack a consideration, unless special circumstances would take the case out of the general rule, as in *Bishop vs. Busse*, 69 Ill., 403, and *Cooke vs. Murphy*, 70 Ill., 96. There is a preponderance of the testimony that such a promise was made, and the probability that there was, as well as the justice of the claim, are strongly supported by the concurrent circumstances. *Without reciting that testimony and those circumstances, however, the case may safely be put upon the ground that 'the contract necessarily presupposes and implies, on the part of the appellees, an obligation to supply' that*

*upon which the appellant was to do his work. Broom's Legal Maxims, 667. It was the legal duty of the appellees to keep the work in such a state of forwardness as to enable the appellant to perform his contract within the limited time. See vs. Partridge, 2 Duer., 463. The provision for the extra time was for the avoidance of the penalty the appellant would incur if he did not complete his contract on time. In its language it purports to be a benefit to him; an allowance, not a deprivation, of his right to require the work to be in readiness for him. Under a provision in the specifications with other contractors, whose work preceded that of the appellant, like that in the specifications for his work, the appellees had in their hands indemnity for the increase to the price of the appellant's work. If they did not have such a provision it was their own omission, the consequence of which is not chargeable to appellant. If the appellees desired exemption from their obligations under the contract, they should have put such exemptions in clear language that would have put appellant on his guard, and left no doubt as to what was intended. * * * It is only by the application of the maxim,* 'EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS,' *that the claim of the appellant can be cut off; that, as there is one consequence of delay caused by other contractors declared, all others are, by that declaration, excluded. But this maxim 'is not of universal application, but depends on the intention of the parties as discoverable upon the face of the instrument, or of the transaction.' Broom's Legal Maxims, 653. The claim made by the appellant is not within the clause quoted from the contract as to questions the architects should decide. There is no question of the value of extra work, nor is there any disagreement between the parties relating to performance of the contract.* The amount which the appellant should recover if he is entitled to recover at all, being undisputed, the decree is reversed and the cause remanded with directions to allow to appellant $478.20 for his damages for delay, as well as the amount due him upon the contract."

See also: *Frost vs. Rand, McNally & Co.* (51 Ill. App., 276).

Del Genovese vs. Third Ave. R. Co. (13 N. Y. App. 412, 1897). The contract drawn in question related to an excavation for the foundation of a power house. The complaint set out two causes of action: one for an unpaid balance of the contract price; the other for damages sustained by plaintiff in consequence of numerous hindrances and delays caused by agents of the defendant company. The case went to a referee who found for the plaintiff, reporting that, in consequence of directions given by the architect, defendant's agent, which the plaintiff was required to obey, he had on certain occasions been obliged to suspend work altogether and at other times had been greatly obstructed in his operations by the presence of material and apparatus of other contractors engaged in doing other parts of the work. After hearing on defendant's exceptions, the referee's report was confirmed by the court and judgment for the plaintiff entered. On appeal, the court in general term affirmed the judgment, saying (p. 415):

> "There can be no question but that, under this contract, there was an 'implied understanding by all the parties that they (the plaintiffs) were to be unrestricted in the employment of means to perform it, and that nothing which it was the duty of the owner to do to enable the contractors to perform should be left undone,' and the question is whether there has been a breach by the defendant of his implied understanding or contract. * * *"

Also (p. 422):

> "But what the contractor is entitled to is such opportunity to perform his contract as under all circumstances, considering the nature of the work and what the other contractors have to do, is reasonable; and where the owner, or his representative, interferes in

such a way as to prevent one contractor from having such reasonable use of the premises, or such reasonable opportunity to perform his contract, *and damage follows therefrom, there is no reason why he should not be liable; and such a contract or duty will be more readily implied where, as here, the time of the performance of the contract is limited.*"

Also (p. 424):

> "*We also agree with the referee that the provision of the contract allowing the architect to adjust and arrange a proper allowance for any loss of time by which the contractor should be delayed on account of other contractors, is no defense to the claim of the plaintiffs to be paid the damages sustained by reason of the unreasonable or improper act of the defendant in violating its agreement with them. It does not appear that the architect acted under this provision of the contract, but if he had, it is clear that the only object of the provision was to extend the time for the completion of the contract by the plaintiff in case of such a delay caused by the other contractors in the proper performance of their work. Two cases are cited: Haydnville Min. & Mfg. Co. vs. Art Institute* (39 Fed. Rep., 484) *where, under a somewhat similar provision in a contract, the defendant's contention was adopted; and Nelson vs. The Pickwick Associated Co.* (30 Ill. App., 333) *where the contrary view was taken. We agree with the referee that the latter case should be followed.*"

This decision was affirmed without opinion by the Court of Appeals of New York. (162 N. Y., 614—1900.)

C.

In support of their contention last mentioned counsel for the Government cited a number of authorities, all of which are readily distinguishable from the present case. These will be reviewed.

Harmon on Contracts (p. 808 and Sec. 390). This is but a statement of the rule that where parties enter into engagements with express stipulations it is to be presumed that they have expressed all conditions by which they intend to be bound, unless an intention to the contrary appears; also that where an agreement has been reduced to writing the parties will not be permitted to deny that they intended to make the stipulation contained in the instrument. We are not seeking to add one syllable to the contract, nor are we attempting to deny that the parties meant what the contract provides. We show that the Government covenanted to do a certain thing and failed to do it and in consequence of that failure the building company suffered damage. The contract was essential to the existence of the breach but the breach was not an act done under the contract. The Government's default was extrinsic and in violation of the contract. The building company's right to recover damages accrued to it because of that violation.

Higgins vs. Eagleton (34 N. Y. Supplement, 225). In that case it appeared that the defendant had contracted to sell the plaintiff a certain house of which the northerly wall was a party wall and to convey the same to the plaintiff free and clear of encumbrances except those enumerated. Defendant tendered a proper deed which plaintiff refused to accept, on the ground that a wall of the house, other than the northerly one, was a party wall and hence the adjoining owner had rights which constituted an encumbrance upon the property other than those specified. Plaintiff sued to recover the sum which he had paid to bind the contract to

sell, and obtained judgment. On appeal this was affirmed, the court holding that the description of the northerly wall as a party wall clearly indicated that the other walls of the house were independent structures. It is not perceived how that case can shed any light upon the one now before this court.

Aspen vs. Austen (5 Q. B. D., 671). Plaintiff agreed to manufacture material for the defendant and the latter agreed to pay him for his services, at one specified rate per week for two years, at a higher rate per week during a third year, and then to take him into partnership. Before the expiration of the three years defendant refused to proceed under this arrangement. The plaintiff thereupon brought his action, alleging an unlawful discharge by defendant contending that the contract was one for continuous employment. The court held otherwise, saying:

> "* * * where words of recital or reference manifested a clear intention that the parties should do certain acts, the courts have from these inferred a covenant to do such acts, and sustained actions of covenant for the non-performance, as if the instrument had contained express covenants to perform them. But it is a manifest extension of that principle to hold that, where parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act fitting or even necessary for the perfect performance of their express covenants. Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications. The presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on and the service in fact continued during the three years, and yet neither party might have been willing to bind

himself to that effect, and it is one thing for the court to effectuate the intention of the parties to the extent to which they have even imperfectly expressed themselves, and another to add to an instrument all such covenants as, upon a full consideration, the court may deem fitting for completing the intentions of the parties, but which they either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; *the latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application.* The breach here assigned assumes that the defendant, at however great loss to himself, was bound to continue his business for three years; but the defendant has not covenanted to do so; he has covenanted only to pay weekly sums for three years to the plaintiff on the condition of his performing what, on his part he has made a condition precedent; and the plaintiff will be entitled to recover those sums, whether he performs that or not, so long as he is ready and willing to perform it, and is prevented only by the defendant from doing it. This then is the safe rule for determining the rights of these parties between each other and no injustice falls to the plaintiff. If he should assign a breach in the non-payment of the weekly sums, it would be no answer for the defendant to say that he had discontinued the business and dis-
fil missed the plaintiff; the reply would be that he might,
fil indeed, if he pleased, do both, but that he was still bound to make the payment which he had previously covenanted to make."

There is nothing in that which conflicts with this claimant's right to recover. We are not asking the court to imply a covenant of the government to provide armor plate to enable us to set up the breach complained of. We are not asking for any addition to the Government's undertakings. We show an express covenant (Par. 3) and its breach. *We ask damages not because the Government*

agreed to pay them, but because it did not furnish armor as it had agreed.

Stephens vs. Smith (10 Wall., 321, 326). Congress had passed an act prescribing a method by which certain Indians could sell their lands. This was for the protection of Indians to safeguard them against their own improvidence and the cupidity of white men. The case turned upon the validity of a sale by an Indian. The court said:

> "It needs no argument or authority to show that the statute having provided the way in which these half-breed lands could be sold, by necessary implication prohibited their sale in any other way. The sale in question not only contravened the policy and spirit of the statute but violated its positive provision."

The applicability of this to the present case is not apparent.

Haydnville, etc. Co. vs. Art Institute (39 Fed. R., 484) was an action, brought to recover a balance claimed to be due under a contract for the construction of floors and certain other work in a building and damages suffered by the contractor in consequence of the delay of third parties, who were already under contract to construct other parts of the building, when the contract in question was made. The latter contained this clause:

> "Should delay be caused by other contractors to the positive hindrance of the contractor hereto, a just and proper amount of extra time shall be allowed by the architects, provided it (the contractor) shall have given notice to said architects at the time of such hindrance or delay."

The specification, forming part of the contract provided:

> "That the first, second and third stories are ready for those floors and the contractor may enter at once upon said work; arches in these three stories to be

completed on or before September 30th. The fourth (attic story's roof and partitions) shall be completed in 30 days after the contractor has received notice that these stories are in readiness for his material."

The court said:

"Taking this clause of the contract and the specifications together, I construe them to mean this: that, if the plaintiff was delayed by reason of the tardiness or want of despatch on the part of the contractors, doing the other classes of work upon the building, it should be entitled to such further time for the completion of the work as the architects should allow; but I do not see that there is any provision that it is entitled to pecuniary damages by reason of said delay. Evidently the parties anticipated that this contractor doing only a part of the work, and that which was largely dependent upon the completion of other classes of the work by other contractors, must await the movements of these other contractors; and it seems to me that the stipulation for further time to complete the work in case of delay by other contractors implies that there is to be no pecuniary compensation for such delay."

The line of reasoning adopted by the court was, clearly this and was tenable on no other theory: The delay was due to the default of third parties. When the contract was made both parties understood that other persons were engaged to do other work upon the building and that without his fault or that of the owner plaintiff's work might be delayed beyond the period stipulated by the default of these strangers. Neither party assumed responsibility for the default of the strangers. Both parties were innocent of causing the delay that occurred, and, therefore, there was no breach by the defendant.

We have in the present case a different situation. According to the contract in suit, there were but two

parties concerned in the building of the "*Alabama*": the United States and the Cramp Company. The company was to build the vessel complete, but each party was to contribute material and the obligation of each in that respect was absolute and unconditional. Each was free to procure the material that it had undertaken to contribute in any manner that it pleased. The contract in suit was signed on September 24, 1896. The working drawings and templates showing the dimensions and shape of all armor plates were duly furnished to the Government by the shipbuilder (p. 21—Finding V); but it was not until June 9, 1898, that the Government let a contract for the armor (p. 22—Finding VIII). To carry on their work properly the shipbuilders had then been in need of the armor for four months (p. 21, Finding V). The contract for the armor was negotiated and concluded between the United States and a third party. The Cramp Company was a stranger to it and had no voice in choosing the time to make it, or its terms, or even in the selection of the armor maker. The first of the armor plate was delivered on December 22, 1898. The Court of Claims, in its Finding XIV, said: "By reason of delays on the part of the armor makers, the armor was not delivered to the claimant company as early as it should have been and the vessel was not delivered to the defendant until October 16, 1900." That is a conclusion, and if intended to shift the blame for delay from the United States to the Bethlehem Company is in conflict with and disproved by the court's own findings of substantive fact, showing, as stated above, that the armor was not even ordered by the Government until June 9, 1898, whereas the shipbuilder had need of and became entitled to a large part of it on February 15, 1898 (pp. 21-22, Findings V and VIII); also (p. 22, Finding IX) that the very last of the armor was delivered on June 7, 1900, a little less than two years after the date of the contract. The contract for armor plate did

not call for deliveries earlier than those made. In the report of the Chief of the Bureau of Ordnance, Navy Department, dated October 1, 1898 (Annual Report of the Navy Department, 1898, p. 474), it was said:

> "In consequence of the limitation placed by Congress as to the price that might be paid for armor the Department was debarred from making contracts for armor for the battleships *'Alabama,' 'Illinois,'* and *'Wisconsin,'* until one year and nine months after the vessels themselves had been contracted for, as no bids could be obtained for armor within the limit of cost allowed. When, by subsequent action, Congress raised the limit of cost from $300 to $400 per ton, contracts were made *(in June last)* for armor for the above vessels, deliveries to *begin in December next* and to continue at the rate of 300 tons per month from each company until contracts are completed. This *delay in contracting for the armor until so long a period after the vessels had been contracted for was unfortunate, as it prevents the Bureau from supplying the armor as promptly as the shipbuilders require it.* The total weight of armor required for the three vessels referred to has been divided equally, as nearly as practicable, between the *two only armor manufacturers* in this country, each making the entire armor for one ship, and that for the third being divided between the two. * * * The armor for the *Alabama, Illinois,* and *Wisconsin* is advanced far beyond the requirements of the contract and deliveries will begin much in advance of the stipulated time. * * * The armor now under contract for each of these three latter ships is 2,559 tons."

From that it is apparent that if the armor had been ordered by the Government without undue delay, there would have been no retardation of work upon the vessel. The Government has not offered to excuse its default by an attempt to shift the blame for delay to the armor makers. The contract in suit would not have permitted such an excuse, if offered, for the Government's obligation with

respect to the delivery of armor was unconditional. But it is needless to elaborate the reasons for our contention that the Government was responsible for the delay and alone answerable to the Cramp Company for its consequences. That question was submitted to the Secretary of the Navy as required by the contract, and he, as the final arbiter for such matters, appointed by the contract, found that the Government alone was at fault.

In *Richard vs. Clark* (88 New York Supp., 242), it appeared that plaintiff had contracted to construct a model of a residence for the defendant. Plaintiff was to provide all the materials needed and do all of the work. The model was to be made according to plans which were to be furnished by a certain architect. The defendant himself did not undertake to contribute anything. The work was to be completed prior to a given date but it was stipulated: "should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect or default of the owner or architect * * * then the time fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid." The plaintiff's compensation was described thus: "It is mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be the net cost of all labor and materials and shall in no case exceed the sum of $1,000—which sum shall include all changes and alterations in the work that may be required by the architect." The contractor did not complete the model until after the date specified, the work being delayed by the failure of the architect to furnish the plans soon enough. The owner accepted it and paid the contractor $1,000, but refused to pay the damage claimed by him on account of the architect's delay. Thereupon the contractor brought suit. The court held that he was not entitled to recover, saying that

the extension of the building period was the full measure of his remedy as against the owner. There are material differences between that case and the present one. In *Richard vs. Clark* the owner did not undertake to contribute anything in the way of material or work, and did not even guarantee that the architect would furnish the plans within any particular time. By the contract now in question the United States *itself* undertook to provide armor and undertook to provide it in due season to enable the shipbuilder to proceed with its work, unobstructed. In *Richard vs. Clark* the court found that the parties contemplated delay caused by the architect, a third party, and by their contract provided what the consequence of such delay would be. The responsibility of the owner was not extended beyond the continuance of his obligation to take the model and pay the stipulated price. The requirement of the contract in suit, with respect to the furnishing of armor (*Par. "Third"*) did not contemplate delay in the delivery of armor because the obligation was the Government's own and did not specify the consequence of such delay on its part. It should be noted that *Richard vs. Clark* (*supra*) was a decision of the appellate term of the Supreme Court of New York, not the Court of Appeals. If susceptible of the application that the Government seeks to give it, it is in direct conflict with the decision of the Court of Appeals in *Del Genovese vs. Third Ave. R. Co.* (*supra*). It does not appear to have been followed or even cited in any other opinion of that State, and we have been unable to find a reference to it in other reports.

D.

In the court below the defendant contended that some of the items of the claimant's damage now mentioned in the findings of the Court of Claims were not matters for

which the builder was legally entitled to recover. We insist that they are, but, inasmuch as this appeal runs from the judgment dismissing the petition and not from any particular findings, we reserve the right to reply to any comments that the Government may make touching the measure of damages.

We submit that for the errors shown the judgment should be reversed.

JAMES H. HAYDEN,
ROBERT C. HAYDEN,
Of Counsel for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. 92

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, Appellant,

vs.

THE UNITED STATES

REPLY BRIEF FOR THE APPELLANT

JAMES H. HAYDEN,
ROBERT C. HAYDEN,
Of Counsel for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. 92.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

REPLY BRIEF FOR THE APPELLANT

I.

Under the contract (Paragraph Third) the government's obligation to furnish armor plate for the vessel was absolute and unconditional. It could not excuse its own default in the discharge of that obligation, by setting up a default of a third party, in an independent transaction to which the Cramp Company was a stranger.

On page 4 of their brief counsel for the United States say that the United States having no armor plant of its own was obliged to obtain, and did obtain, the armor furnished for the "Alabama" from contractors who failed to complete the manufacture of the same in time for delivery to the appellant "within the times and in the order required to carry on the work properly." That, presumably, is an attempt by the government to shift the blame for the delay in delivery of armor to the armor makers and enlist the sym-

pathy of the court in the government's behalf to the detriment of the aggrieved shipbuilder. The excuse would be of no effect if the allegation were true, but the allegation is untrue. The findings of the Court of Claims relating to the delivery of armor, made no mention of the fact that the government had no armor plant or had to procure the armor from third parties. In one finding it was said (Finding XIV, p. 23):

> "By reason of delays on the part of the armor contractors, the armor was not delivered to the claimant company as early as it should have been, and the vessel was not delivered to the defendant until October 16, 1900."

That conclusion of fact, however, is flatly contradicted by another conclusion of fact, contained in Finding XVIII (p. 30), where the court said:

> "By reason of the said several failures and delays *of the United States with respect to the furnishing of the armor* for the said battleship, and the delay in her completion and difficulties experienced in her construction consequent thereon, *the claimant* was put to extra expense in the performance of the contract in suit, and *sustained damage* to the amount of $49,792.66."

Again there are findings of substantive fact which show that the conclusion stated in Finding XVIII is correct and that the blame for the delay was in fact attributable to the United States alone. Finding VIII (p. 22) reads:

> "On *June 9, 1898*, the United States entered into a contract with the Bethlehem Iron Company, which provided for the manufacture and delivery by the latter of the armor required for the said battleship."

Thus the government did not even order the armor until four months after the construction of the vessel had reached a point where the builders needed the armor to carry on their work properly. The first of the armor was delivered, December 22, 1898, or six and one-half months after the government let the contract for it. (Finding V, p. 21.) The armor maker could not have manufactured, tested and delivered it in a shorter period. The government's contract with the armor maker did not require the first delivery until December, 1898, or ten months after the lack of it had begun to embarrass the shipbuilders.

While the findings do not disclose the government's reason for omitting to order the armor until June 9, 1898, counsel for the government have gone outside the record in discussing this phase of the case and to prevent the court from being misled the same privilege must be given to the claimant. It was a matter of common knowledge that when the contract for the vessel was made, September 22, 1896, it was by no means certain that the government would procure the armor for the vessel by contract. The only armor manufacturers of the country had refused to furnish it to the government for less than $400 a ton, a price considerably less than that paid by any foreign government. Congress, however, had refused to appropriate money for the manufacture of armor at more than $300 a ton and forbade the Secretary of the Navy to make any contract for it in excess of that rate. The establishment by the government of an armor plant of its own was seriously considered by the Navy Department and by Congress. By the naval appropriation act of 1898, Congress authorized the Secretary to contract for armor at $400 a ton, and pursuant to that authority he finally made the contract with the Bethlehem Iron Company to furnish the armor required for the "Alabama." The shipbuilder being entitled to receive the armor from the gov-

ernment at the times and in the order required to carry on its work properly, was an entire stranger to all of these transactions with respect to the manufacture of armor. It is pitiful, indeed, for this government to seek to evade responsibility for breach of its absolute and unconditional obligation by a contention so entirely devoid of merit in law or in fact.

Consider the contract in suit from the standpoint of the shipbuilder's obligations. The shipbuilder was not a manufacturer of beams, girders, hullplates and other structural material required for use in the construction of the vessel, yet the company assumed the obligation to furnish these things and was bound by it. Suppose for any reason it had not been able to procure such materials from third parties, or, like the Government, had not been willing to pay the prices for which such things were procurable. Can it be supposed, for a moment, that that would have been accepted by the Navy Department, or by any court as a valid excuse for the shipbuilder's failure to furnish the material in due time. The contract (Paragraph Ninth, p. 8) in enumerating the grounds on which the shipbuilder might be excused from penalty for failure to finish the vessel within the building period mentioned, circumstances beyond the builder's control, but said: *"but such circumstances shall not be deemed to include delays in obtaining materials."*

II.

The contingencies mentioned in the latter part of Paragraph Third of the contract with respect to non-delivery of armor by the Government did not arise and the several provisions with respect to them did not affect the rights or obligations of the parties now in controversy. Even if these contingencies had arisen the Cramp Company would be entitled to damages caused by the Government's breach of its covenant to deliver the armor.

In their brief counsel for the Government say (pp. 21, 23, 25) that on February 15, 1898, when the construction of the vessel had arrived at a stage where the shipbuilders needed certain armor plate in order to carry on their work properly, the company had the option between two courses: (1) to complete the vessel without her armor, deliver her to the Government in that condition and receive the contract price less the cost of installing the armor; or (2) to await deliveries of armor and complete the vessel, armor and all, but by so doing, waive the company's right to damages for the Government's breach of covenant in failing to deliver the armor when needed. That contention is absolutely without foundation. The contract would not justify it, no matter what the circumstances had been, and the facts were such that the provisions of the contract relied upon, had no effect upon the rights or obligations of the parties. Counsel for the Government base their contention upon part of Paragraph Third of the contract (pp. 6-7) following the recital of the Government's obligation to deliver the vessel's armor to the shipbuilders at the times and in the order required to enable them to carry on their work properly. That is as follows:

> "It is expressly understood, covenanted and agreed that *if, upon the completion of the vessel, except the fitting, fixing, placing and securing of the armor* for her side and diagonal belts, turrets, barbettes, casemates, and conning towers, *the party of the second part (United States) shall not have commenced the delivery of such armor to the party of the first part, then and in such case the vessel shall be subjected to the trial provided for in the tenth clause of this contract, and if, at and upon such trial, all the conditions and requirements relating thereto, except as to the fitting, fixing, placing, and securing of the armor* for the side and diagonal belts, turrets, barbettes, casemates, and conning

towers, *shall be fulfilled the vessel shall be accepted as provided for in the eleventh clause of this contract; and if the party of the second part shall not have commenced the delivery of the armor* for the side and diagonal belts, turrets, barbettes, casemates, or conning towers, *when the vessel is ready for her final trial, or within five months after either a preliminary or a conditional acceptance of the vessel, said vessel shall be finally accepted, subject to the conditions and requirements of this contract, and the cost of fitting, fixing, placing, and securing the armor* for the side and diagonal belts, turrets, barbettes, casemates, and conning towers *shall be ascertained, estimated and determined by a board of naval officers appointed by the Secretary of the Navy; the party of the first part shall be bound by the determination of said board, and such cost shall be deducted from the price of the vessel in the final settlement under this contract; but if the party of the second part shall commence and continue with reasonable diligence the delivery of the armor for the side or diagonal belts, turrets, barbettes, casemates, or conning towers of the vessel prior to her final trial, or within five months after either a preliminary or a conditional acceptance of the vessel, the party of the first part shall fit, fix, place, and secure all the armor to the vessel in accordance with the requirements of this contract and the drawings, plans and specifications hereto annexed."*

THIRD

The preliminary trial referred to in Paragraph Ninth (*supra*) is elaborately described in paragraph "Tenth." This set forth a number of requirements that the vessel must fulfill, before delivery and preliminary acceptance, including a trial at sea:

"She shall be subjected to a trial trip in the open sea, *under conditions prescribed or approved by the Secretary of the Navy, to test the hull and fittings, machinery, including engines, boilers, and appurtenances, the equipment, the installation of the ordnance and*

*ordnance outfit, and the speed of the vessel, and that she shall be accepted only on fulfilment of, and subject to the conditions and agreements hereinafter set forth * * * .*"

The mere reading of these provisions is sufficient to show that the shipbuilder was given no option and required to make no election as to its conduct in the event of default by the Government in furnishing the armor. If the shipbuilder's obligations or rights can be said to have been affected in any way, it was by depriving it of the right that a contractor would ordinarily have in the event of breach by the other party, to terminate the contract and sue for damages sustained and profits prevented. The requirement was that notwithstanding the Government's default and irrespective of the shipbuilder's right to damages, caused by it, the shipbuilder should proceed with the work as far as it could do so without armor. But up to the point of final acceptance it was optional with the Government, at any time, to *commence deliveries of any part of the armor* and restore the contractor's obligation save its right to damage and to the situation in which it would have been if the Government had not made default. It appears from the findings, particularly the reports of the Superintending Contractor, who acted as the Government's representative, that the shipbuilders did at all times continue their work as best they could. They had no right under the contract to suspend work on the vessel when the Government's default began and no such suspension occurred.

If the intent of Paragraph Third (*supra*) had been that, under no circumstances, should the Government become liable for pecuniary damages for default in furnishing armor—*why did not the Government come out honestly and say so in unmistakable terms?* If the Government's covenant to contribute armor was not intended as a material

consideration moving from the Government, or an obligation of the Government which it was bound to discharge, *why was it put in the contract at all?* If the Government merely intended to say that it would furnish *some armor if it pleased, when it pleased,* why the elaborate requirement stating what armor was to be furnished and that deliveries were to be made in such a way that the shipbuilder's work should not be hindered?

It was the Government rather than the shipbuilder that had the option of requiring the construction of the vessel with her armor or without it. There is not a thing in the record tending to show that the Government ever elected to have the vessel constructed without armor. The findings show the contrary. Through his inspectors the Secretary knew that the work was proceeding and he never attempted to suspend it or modify it. It rested with the Secretary to prescribe the conditions for the preliminary trial as was required by the Tenth Paragraph. Without such trial the vessel could not be tendered for preliminary acceptance. There is nothing in the record to show that the Secretary ever formulated such conditions or communicated them to the Cramp Company, and he never did so. In the court below there was evidence to show that the company asked him to permit the completion and the trial of the vessel without armor and that he refused to allow it. That evidence was not contradicted in any way, but the Court of Claims seems to have ignored it. Doubtless the court did not anticipate that the Government would make the contention now under discussion.

The contingencies mentioned in the latter part of Paragraph Third (*supra*) did not arise. The Government elected to and did begin delivering armor for the vessel before she was ready for preliminary acceptance, or could have been made so. These facts are established so clearly by the

findings that the Government's contention, based on a contrary hypothesis, is not even plausible. This is the chronological history of the "Alabama's" construction:

1. On September 24, 1896, the contract was executed. (*Finding II, p. 21*).

2. On February 15, 1898, sixteen and one-half months after the date of the contract, her construction had advanced to a point where her builders needed armor to continue their work upon her properly. (*Finding V, p. 21*).

3. On May 18, 1898, the vessel then being 55 per cent completed, was launched. (*Finding VI, p. 22*).

4. On June 9, 1898, twenty and one-half months after the date of the contract, the United States placed an order for the manufacture of her armor. (*Finding VIII, p. 22*).

5. On June 30, 1898, a little over twenty-one months after the date of the contract, the Superintending Constructor, representing the Government, estimated that the vessel was 60 per cent completed. (*Finding VII, p. 22*).

6. On December 22, 1898, the Government "commenced the delivery" of armor for the vessel, and thereafter continued to deliver it in instalments up to June 7, 1900, forty-four and one-half months after the date of the contract, and eight and one-half months after the end of the vessel's building period stipulated in the contract. (*Findings V and IX, pp. 21, 22*).

It is obvious that, in the period of less than six months, which intervened between June 30, 1898, when the vessel was 60 per cent completed, and the first delivery of armor, December 22, 1898, it was impossible that she should be completed without armor, tested, tried, delivered to the Government and preliminarily accepted, and then, after the lapse of about five months subsequent to preliminary acceptance, have been finally accepted.

Notwithstanding its obligation to deliver the armor when needed to enable the builder to carry on its work properly,

the Government reserved the privilege of having the vessel constructed, armor and all, provided it commenced deliveries before final acceptance (*Contract, Paragraph Third*). Therefore, it is absurd to say that the contingency mentioned in the latter portion of that paragraph ever arose, or, in any degree, modified the rights and obligations of the parties save that the shipbuilder had to continue its work upon the vessel.

JAMES H. HAYDEN,
ROBERT C. HAYDEN,
Of Counsel for Appellant.

[redacted]

No. 92

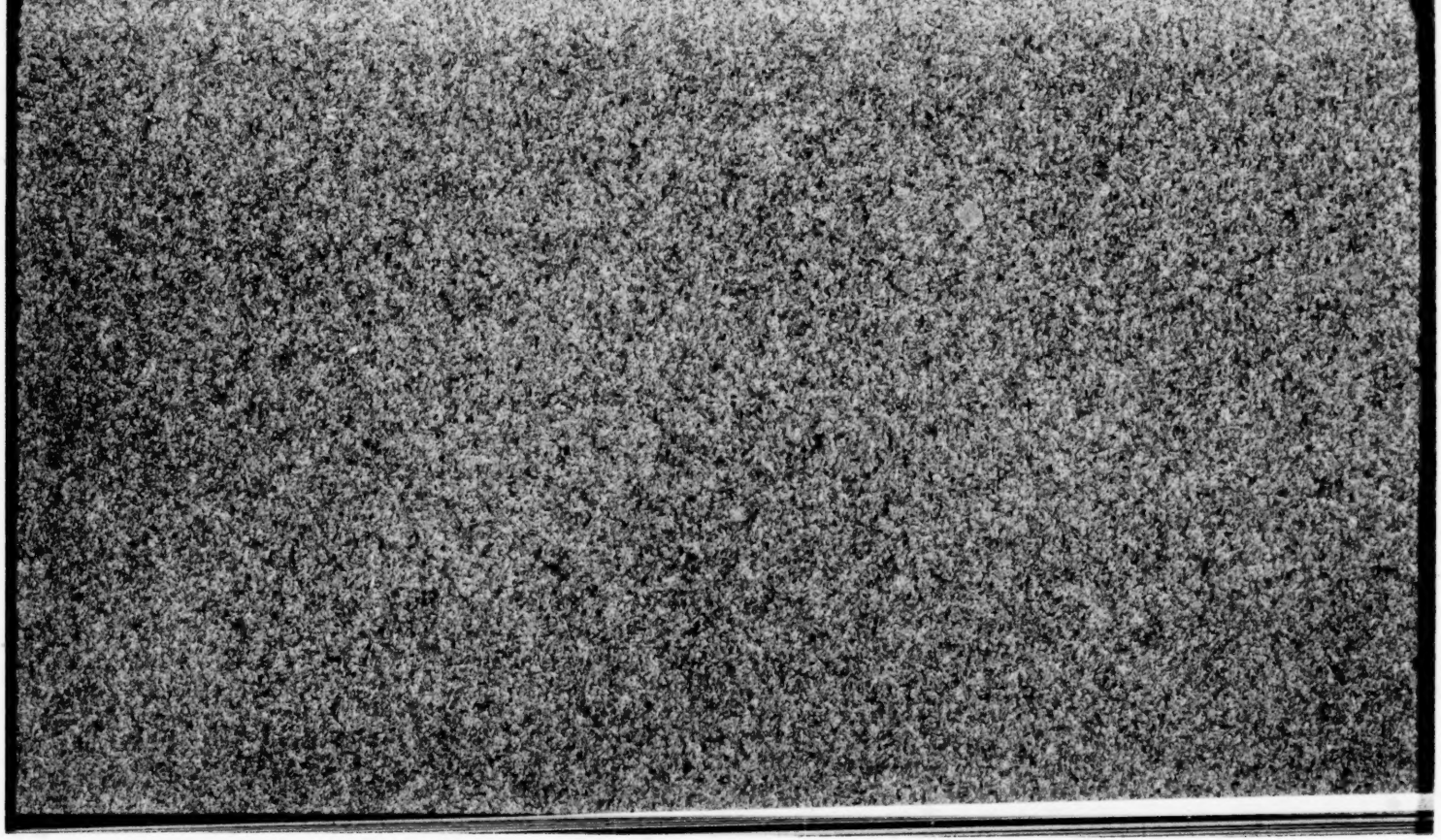
In the Supreme Court of the United States

[redacted]

THE UNITED STATES

[redacted]

BRIEF FOR THE UNITED STATES



In the Supreme Court of the United States.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, appellant,
v.
THE UNITED STATES.

No. 92.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Appellant, a corporation organized under the laws of the State of Pennsylvania, brought suit in the Court of Claims for the sum of $78,584, alleging failures on the part of the United States to comply with its contract in the construction of a battle ship referred to as No. 8 and now known as the *Alabama*.

Among other things, the contract contained the following provisions: The United States was to furnish certain armor and armor bolts to be used in the construction of the vessel, including such as might be "required in the construction of the side and diagonal belts, turrets, barbettes, casemates, conning

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towers, ammunition tubes, and protection for the guns and loading positions * * * and deliver said armor and armor bolts at the shipyard of the party of the first part within the times and in the order to carry on the work properly." (Rec., p. 6.) The contractor was to put the armor in place on the ship, build and equip the vessel in all other respects, and complete the same in three years from the date of the contract. In case of failure to comply with the contract, provision was made for a deduction of $75 per day for the first three months of such delay, $150 per day for the second three months' delay, and $300 per day for all delays beyond the period of three years and six months from the date of the contract. (Rec., p. 9.)

It was also provided that "all delays which the Secretary of the Navy shall find to be properly attributable to the party of the second part, or to its officers, or agents, or any or either of them, to have been delays operating upon the completion of the vessel within the time specified therefor by the contract, shall entitle the party of the first part to a corresponding extension of the period prescribed for the completion of the vessel." (Rec., p. 9.)

"If upon the completion of the vessel, excepting the fitting, fixing, placing, and securing of the armor for her side and diagonal belts, turrets, barbettes, casemates, and conning towers, the party of the second part shall not have commenced the delivery of such armor to the party of the first part, then and in such case the vessel shall be subjected to the trial

provided for in the tenth clause of the contract," and if upon such trial all the conditions of the contract, except as to such armor, should be fulfilled, the vessel should be preliminarily accepted; and if within five months after such preliminary acceptance the United States should not have commenced the delivery of such armor, the vessel should be finally accepted and the cost of putting the armor in place left to the determination of a board appointed for this purpose, and the cost of the same as ascertained by said board should be deducted from the contract price. But if before the final trial, or within five months after the preliminary acceptance, the United States should "commence and continue with reasonable diligence the delivery of the armor," the contractor was to put it in place in accordance with the contract. (Rec., pp. 5–7.)

The appellant failed and neglected to avail itself of the provision of the third paragraph of the contract providing for the preparation and completion of the vessel for its trial without the fitting, fixing, placing, and securing of the armor, and which it might have done on the default of the Government to deliver the same "within the times and in the order to carry on the work properly."

Payment was to be made in thirty equal instalments as the work progressed, with a reservation of 10 per cent from each instalment. The last three instalments, as well as the reservations provided for from the first twenty-seven, were not to be paid until the preliminary acceptance of the vessel; and for the

further protection of the United States and to cover possible defects a special reserve of $60,000 was to be retained by the United States until the final acceptance of the vessel. (Rec., p. 14.)

Upon the full performance of its part of the contract the appellant was to receive the "special reserve, or surplus, if any, of said reserve fund * * * on the execution of a final release to the party of the second part in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract." (Rec., p. 14.)

The United States, having no armor plant of its own, was obliged to obtain, and did obtain, the armor from other contractors who failed to complete the manufacture of the same in time for delivery to the appellant "within the times and in order required to carry on the work properly," and in consequence of this the completion of the vessel was delayed. By reason of the failure of the United States to furnish the armor for the said ship when the same was required by the contractor the completion of the vessel was delayed for a period of three hundred and eighty-seven days (Finding XIII, Rec. p. 23) beyond the original contract period, and was not delivered to the United States until October 6, 1900.

Upon the request of the contractor made upon the Secretary of the Navy appellant was first notified on October 9, 1899, that "the provisions of the ninth clause of the contract for the construction of

said vessel, relating to deductions from the contract price for delays, will be suspended for a reasonable time, pending the final delivery of the armor, and the question of the extension of time will be determined when the armor is all delivered," and later, on October 31, 1900, the contract time for the completion of the ship was duly extended until the date of its preliminary acceptance, or October 22, 1900.

In consequence of this extension no deduction on account of delay was made from the contract price of the vessel, which was paid to the appellant in full. (Fourteenth finding Court of Claims, Rec. pp. 23 and 24.)

After the completion and delivery of the ship, and on February 9, 1901, the contractor sent a communication to the Secretary of the Navy, in which claim was made for the damage alleged to have been sustained in consequence of the failures and delays of the United States. To this communication, on February 13, 1901, the Secretary of the Navy made reply by letter, in which statement was made to the effect that "after a careful consideration of the subject, the claim, being for unliquidated damages, is of a kind the department has no authority under the law to entertain." (Rec. p. 24.)

On April 15, 1901, appellant, through its counsel, suggested a form of proviso to accompany the final release.

On April 17, 1901, the Secretary of the Navy made reply, in which the proviso suggested by the

appellant was not accepted, but in its place the following was substituted:

> Provided, that this release shall not be taken to include claims arising under the said contract other than those which the Secretary of the Navy had jurisdiction to entertain. (Rec., p. 26.)

This was subsequently embodied in the final release which was given which was identical in essential particulars with that given in the case of the *Indiana*, and which was passed on by this court (206 U. S., 118), save as to the proviso.

The court below held that "by reason of the said several failures and delays of the United States with respect to the furnishing of the armor for the said battle ship, and the delay in her completion and difficulties experienced in her construction consequent thereon, the claimant was put to extra expense in the performance of the contract in suit and sustained damage to the amount of $49,792.66." This is more fully set forth in the itemized schedule which is embodied in the findings. (Rec., p. 30.)

Upon the foregoing facts the court dismissed the petition and entered judgment in favor of the Government on the authority of the opinion rendered by this court in the case of *United States* v. *William Cramp & Sons Ship & Engine Building Company* (206 U. S., 118), which was a claim growing out of the construction of the battle ship *Indiana*. The battle ship *Indiana* was constructed by appellant herein under a contract practically identical in terms

with that in the case at bar, and a final release was given which differs from the final release in the present case in but one respect, namely, the proviso italicized in the *Alabama* release, reading as follows:

> *Provided, That this release shall not be taken to include claims arising under the said contract other than those which the Secretary of the Navy had jurisdiction to entertain.*

For the convenience of the court copies of the final releases in the two cases are here set forth.

The Indiana release.

Whereas by the eleventh clause of the contract dated November 19, 1890, by and between the William Cramp and Sons Ship and Engine Building Company, a corporation created under the laws of the State of Pennsylvania, and doing business at Philadelphia, in said State, represented by the president of said company, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, for the construction of a seagoing coast-line battle ship of about ten thousand tons displacement, which, for the purpose of said contract, is designated and known as "Coast-line battle ship No. 1," it is agreed that a special reserve of sixty thousand dollars ($60,000) shall be held until the vessel shall have been finally tried; provided that such final trial shall take place within five months from and after the date of the preliminary or the conditional acceptance of the vessel; and

Whereas by the sixth paragraph of the nineteenth clause of said contract it is further provided that when all the conditions, covenants, and

The Alabama release.

Whereas by the eleventh clause of the contract dated September 24, 1896, by and between the William Cramp and Sons Ship and Engine Building Company, party of the first part, and the United States, party of the second part, for the construction of battle ship No. 8, the *Alabama*, it is agreed that a special reserve of sixty thousand ($60,000) dollars shall be held until the vessel shall have been finally tried; provided that such final trial shall take place within five months from and after the date of the preliminary acceptance of the vessel; and

Whereas by the seventh paragraph of the nineteenth clause of said contract it is further provided that when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said special reserve, or the surplus, if any, of the said reserve fund, or so much of either as the said party of the first part may be

provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said special reserve or so much thereof as it may be entitled to on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy of all claims of any kind or description under or by virtue of said contract; and

Whereas the final trial of said vessel was completed on the eleventh day of April, 1896; and

Whereas all the conditions, covenants, and provisions of said contract have been performed and fulfilled by and on the part of the party of the first part:

Now, therefore, in consideration of the premises, the sum of forty-one thousand one hundred and thirty-two dollars and eighty-six cents ($41,132.86), the balance of the aforesaid special reserve ($60,000), to which the party of the first part is entitled, being to me in hand paid by the United States, represented by the Secretary of the Navy, the receipt whereof is hereby acknowledged, The William Cramp and Sons Ship and Engine Building Company, represented by me, Charles H. Cramp, president of said corporation, does hereby for itself and its successors and assigns, and its legal representative, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid, entitled to, on the execution of a final release to the party of the second part, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under and by virtue of said contract; and

Whereas said vessel was preliminarily accepted on the 22d day of October, 1900, and her final trial completed March 11, 1901; and

Whereas all the conditions, covenants, and provisions of said contract have been performed and fulfilled by and on the part of the party of the first part, excepting certain minor defects, deficiencies, and items of uncompleted work, to cover which the sum of twenty thousand dollars is, according to an understanding between the respective parties to said contract, and as stated in the letter dated April 9, 1901 (No. 2919-01), of the Secretary of the Navy to the parties of the first part, to be withheld by the party of the second part until the completion of the vessel in said respects; and

Whereas owing to the inexpediency at this time of keeping the *Alabama* at a navy-yard long enough for the doing of the work in question, the party of the second part has consented to pay to the parties of the first part all balances due under said contract, excepting the said special reservation of twenty thousand dollars:

Now, therefore, in consideration of the premises, the sum of forty thousand dollars ($40,000), the amount of the aforesaid special reserve, less the above-mentioned reservation of twenty thousand dollars ($20,000), being to me in hand paid by the United States, represented by the Secretary of the Navy, the receipt whereof is hereby acknowl-

In witness whereof I have hereunto set my hand and affixed the seal of The William Cramp and Sons Ship and Engine Building Company this eighteenth day of May, A. D. 1896.

[SEAL] CHAS. H. CRAMP,
President.

Attest:

JOHN DOUGHERTY,
Secretary.

edged, the William Cramp and Sons Shipand Engine Building Company, represented by me, Charles H. Cramp, president of said company, does hereby, for itself and its successors and assigns, and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever in law and in equity, for or by reason of or on account of the construction of said vessel under the contract aforesaid, excepting the sum of twenty thousand dollars, withheld by the Secretary of the Navy as above set forth:

Provided, That this release shall not be taken to include claims arising under the said contract other than those which the Secretary of the Navy had jurisdiction to entertain.

In witness whereof the William Cramp and Sons Ship and Engine Building Company has caused its corporate name to be hereunto subscribed and its corporate seal to be affixed this nineteenth day of April, 1901, by Charles H. Cramp, its president.

[Seal of the William Cramp and Sons Ship and Engine Building Co.]

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY,
By CHAS. H. CRAMP,
President.

Attest:
CHAS. T. TAYLOR,
Secretary.

ARGUMENT.

The proviso not sufficient to confer upon apellant right of recovery.

The issue here is whether the proviso in the release saves the contractor from the final and complete surrender of his right of recovery on the claims set out in the petition.

The sixth clause of the nineteenth paragraph of the contract for the battle ship *Indiana*, and the seventh clause of the nineteenth paragraph of the contract in the case at bar are identical in language and are as follows:

> When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled upon the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive said "special reserve," or the surplus, if any, of the said "reserve fund," or so much of either as the said party of the first part may be entitled to, on the execution of a final release to the party of the second part, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under and by virtue of this contract.

In construing the final release in the *Indiana* case in connection with the foregoing clause of the contract, Mr. Justice Brewer, speaking for the court, said:

> To rightly understand the scope of this release we must consider the conditions of the

contract, and especially the clause in it which calls for a release. The contract was a large one, the price to be paid for the work and material being over $3,000,000, and the contract was evidently designed to cover all contingencies. Provision was made for changes in the specifications, for penalties on account of delays of the contractor, deductions in price on certain conditions, approval of the work by the Secretary of the Navy, forfeiture of the contract, with authority to the Secretary to complete the vessel. The last paragraph contains the stipulations as to the amounts and times of payment with authority for increase of the gross amount upon certain conditions. The sixth clause of this paragraph makes special provision for the last payment, to be made "when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of of the party of the first part," and "on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract." Evidently the parties contemplated and specially provided by this stipulation that the whole matter of the contract should be ended at the time of the final release and the last payment. That which was to be released was "all claims of any kind or description under or by virtue of said contract." Manifestly included within this was every claim arising not merely from a change in the specifications, but also growing out of delay

caused by the Government. The language is not alone "claims under," but "claims by virtue" of the contract—"claims of any kind or description." All the claims for which allowances were made in the judgment of the Court of Claims come within one or the other of these clauses. It may be that, strictly speaking, they were not claims under the contract, but they were clearly claims by virtue of the contract. Without it no such claims could have arisen. Now, it having been provided in advance that the contract should be closed by the execution of a release of this scope it can not be that the company, when it signed the release, understood that some other or lesser release was contemplated. It must have understood that it was the release required by the contract—a release intended to be of all claims of any kind or description under or by virtue of the contract—and that the form of words which the Secretary had approved was used to express that purpose. With that release stipulated for in the contract the company signed the instrument of May 18, 1896, which in terms purported to "remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of or on account of the construction of said vessel under the contract aforesaid." Now, whatever limitation may be placed upon the words "for" or "on account of" the construction the provision for the release of all claims and demands

whatsoever, "by reason of the construction of the vessel under the contract aforesaid," is a recognition of the contract, and includes claims which arise by reason of the construction of the vessel under it. "By reason of" may well be considered as equivalent to "by virtue of." It is only by reason of the performance of the contract in the construction of the vessel that these claims arise. But for the contract, and the construction of the vessel under it, there would be no such claims. No payment of extra moneys is necessary to sustain this release. It is under seal, and the contract is itself full consideration. As of significance it must be borne in mind that the release referred specifically to the sixth paragraph of the nineteenth clause of the contract, which provided for the character of the release. Indeed, the general language of the release itself and the number of words of description in it show that it was the intent of the Secretary of the Navy to have a final closing of all matters arising under or by virtue of the contract.

Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical, and close construction. The general language, "all and all manner of debts," etc., indicates a purpose to make an ending of every matter arising under or by virtue of the contract. If parties intend to leave some things open and unsettled, their intent so to do should be made manifest. Here was a contract involving $3,000,000, and after the work was done, the vessel delivered and accepted, and this release

> entered, claims are presented amounting to over $500,000. Surely the parties never intended to leave such a bulk of unsettled matters.

Applying the foregoing to the case now under consideration, Mr. Justice Peelle, speaking for the court below, said:

> That language evidently has reference to the contract and its requirements, and therefore when the contract in terms provides that the reserve or final payment will be made "when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part," the claimant was, upon such payment, obligated to sign the release provided by the terms of the contract releasing the Government from "all claims of any kind or description under or by virtue of said contract." And, since the court in the case cited holds that the release of all claims growing out of the construction of the vessel—without which such claims would not have arisen—was a recognition of the contract and settled, as the court says, "all disputes between the parties as to claims sued upon"—including unliquidated claims—the Secretary of the Navy in respect thereto not only had the right to accept such release in the interest of the Government, but under the contract it was his duty to do so.

Counsel for appellant, referring to section 7, paragraph 19, of the contract, say that the same was not a present release (p. 15), but at the utmost an agreement to release contingent upon the performance by

the Government of the considerations specified, and follow this by the statement that "performance by the Government of its covenant to supply armor failing, the builders' agreement to release went with it."

Section 7 contains no reference, either direct or indirect, to "performance by the Government of its covenants to supply armor," nor does it in any manner suggest this as a consideration for the release which was to be given by the contractor. It states specifically (Rec., p. 14), "when all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled, by and on the part of the party of the first part" (Cramp Company), "said party of the first part shall be entitled * * * to receive said special reserve * * * on the execution of a release," etc.

The failure of the delivery of the armor by the Government within the times and in the order required to carry on the work properly had been fully provided for in the contract in other ways, and had nothing whatever to do either as consideration or otherwise with the release which was required by the contract.

Appellant contends in substance that the contract did not obligate it to relinquish the claim in suit, or any other claims that might accrue to it for breach of the contract by the United States; that the contract itself was not a release of such claims; and that the acceptance by the appellant of the last payment did not create a bar to the appellant's right of action for

the breach committed by the United States. (Appellant's brief, p. 12.)

The so-called breach on the part of the United States, which consisted of its failure to deliver the armor within the times and in the order required to carry on the work properly, was foreseen by the parties and fully provided for in the contract. (See paragraph 3 of the contract, Rec., pp. 5 to 7; see also ninth paragraph of contract, Rec., pp. 8 and 9.)

1. While the contract itself may not be a release of such claims as those in suit, it nevertheless provided for a release of all claims growing out of the contract.

The case of *Texas, etc., R. Co.* v. *Dashielle* (198 U. S., 521), cited in appellant's brief (pp. 17 and 18), is not apposite. The release given in the case cited had not been previously provided for and the character of the same determined upon between the parties. Again, a different rule of damages and of the interpretation to be given to releases obtains in personal injury cases. Moreover, particular injuries being described in and covered by the release, the court held in that case that the release given was limited to the injuries specified alone. This was not the case with the release in the suit at bar.

Appellant contends that—

> Apart from the plain and explicit language of the release it was clearly understood by the parties that the claim in suit was left open and unsettled, to be adjudicated by the tribunal having exclusive jurisdiction of claims for un-

> liquidated damages. That was the situation of affairs when the first payment of $40,000 was made from the special reserve. When the $20,000 matter was adjusted some months later this suit had been brought and no release whatever beyond a voucher for the payment was asked for or given. (Appellant's brief, p. 20.)

It is sufficient answer to this to inquire, Why should a second release be required of the appellant when the Government was absolved by virtue of the release which had already been given?

The further point is made that certain items of uncompleted work remained at the time the release was given to cover the cost of which the Secretary withheld $20,000 pending completion by the Government at the builders' cost, and statement is made (appellant's brief, p. 21) that if he had authority to make that exception of a matter which he was authorized to settle, he had also authority to make the other exception with respect to claims that he could not entertain and was obliged by law to leave unsettled if the contractor refused to relinquish them.

The Secretary required the final release before he paid any part of the special reserve, which conclusively shows that he did not assume to exercise any discretionary powers except the withholding of the part of the money unearned by the appellant to make the Government safe. This was a question of pure official duty and involved no exercise of discretion whatsoever. During the progress of the work

certain things were left to the discretion of the Secretary of the Navy, but when it came to the matter of making the final payment, his discretionary powers had ceased, and nothing but a ministerial function remained.

The authorities cited to show the power of the Secretary of the Navy to direct the modification of a contract during the progress of the work have no possible bearing on the case at bar where the Secretary's discretionary powers had ceased and only a plain ministerial duty remained.

The case of *Weeks* v. *Rector et al. Trinity Church* (56 App. Div. N. Y., 195, pp. 22, 23) is not in point. The contract in the case cited provided for the exaction of a penalty in case of the contractor's default; and in the absence of express provision the contract by implication clearly provided for damages in case of the default of the other party. In the case at bar provision was made for the exigency of the default of the Government, and this having been done it is improper to read into the contract additional provisions not therein contained or implied. Moreover, in the case cited, there is nothing to show that the contract provided for the kind of a release which was to be given when final payment was to be made.

Appellant's counsel, in an effort to distinguish between the case of the *Indiana* and the one at bar, takes the position that the court in deciding the *Indiana* case made no mistake, because in that case the release was unconditional and given without pro-

test, whereas in the present case the appellant saved its right of protest by virtue of the proviso which was incorporated in the final release.

If the Secretary of the Navy was without jurisdiction to entertain or pass upon claims of the character in this suit, then the release which was given in the *Indiana* case was not sufficient to release the claims in that case. But if the Secretary did have jurisdiction to consider and entertain the claim in the *Indiana* case, he had jurisdiction to consider and settle the claims in the present suit. This court has practically said, however, that the Secretary of the Navy did have jurisdiction to entertain and settle the claims in the *Indiana* case, and a comparison of the claims in that case with the case in suit discloses the fact that they are identical in their nature. Therefore the proviso does not have the effect for which appellant contends. If the Secretary of the Navy had authority and jurisdiction in the one case, he had the same authority and jurisdiction in the other case, and this is the view held by the Court of Claims in its opinion in the case at bar. The Secretary was clothed with authority to close the contract in a prescribed manner. He could not make the final payment until a full and final release of all claims was given by the contractor, neither could he modify or change the form of release required by the contract, but this does not conflict with the exercise of his discretionary powers in respect to changes and modifications while the work was in progress.

Throughout the opinion of the court in the *Indiana* case reference is made to expressions in the contract as controlling rather than the language of the release itself, and the opinion is based upon the requirements of the contract rather than the language and terms used in the release. The effect of this decision is to hold that the claim in question was liquidated in advance and that when the release required by the contract was signed the whole matter was closed.

The proviso does not and can not change the situation or save any substantial rights to the appellant which would have otherwise been forfeited. It could not possibly add to the powers of the Secretary of the Navy, or subtract anything therefrom. It does not even pretend so to do. It simply says in substance, whatever authority inheres in the Secretary of the Navy, he exercises, and, *contra*, whatever authority the Secretary of the Navy does not possess in the premises, he does not assume to exercise. That is all. In other words, such claims as the Secretary of the Navy has jurisdiction to entertain, are covered by the release; while, on the other hand, such claims as the Secretary of the Navy has no jurisdiction to entertain, are not covered thereby. This is a fair analysis of the language of the proviso and interpretation of its meaning. This proviso might just as well have been omitted.

It neither adds to nor detracts from the release required by the contract nor from the release in the

form executed by appellant. The document releases all claims arising out of the contract, under the contract and by virtue of the contract. "Without it [the contract] no such claims could have arisen," and the proviso is just about as effective in saving any rights to this appellant as if it included therein the right to sue the United States for the damage done by the earthquake to the island of Sicily.

The release called for by the seventh paragraph of the nineteenth clause of the contract requires the releasing by the party of the second part, in such form as shall be approved by the Secretary of the Navy, "all claims of any kind or description under and by virtue of this contract." There was nothing left to the discretion of the Secretary beyond the mere form of the release. It was given on the fulfillment of certain stipulated conditions. Everything was to be considered liquidated, satisfied, and closed, and the execution of the release was necessary as a condition precedent to the final payment by the Government. Appellant was not obliged to sign the release; on the other hand, it might have refused so to do and instituted suit to recover not only the amount of the special reserve but all sums claimed to be due on account of the Government's defaults and delays. But having signed the release of every claim of whatever kind or character, growing out of the contract or by reason of the contract, it is now precluded from maintaining this action.

II.

Upon the failure of the Government to furnish the armor "within the times and in the order required to carry on the work properly," the contractor failed to complete and tender the vessel for trial without the armor, as provided for in the contract.

The contingency of the Government's failure to provide the armor within the times and in the order required to carry on the work properly was contemplated by the parties to the contract. Certain armor was to be provided by the contractor in the construction of the protective deck; but beyond this the Government was to furnish "all other armor, and the armor bolts, to be used in the construction of the vessel, including such as may be required in the construction of the side and diagonal belts, turrets, barbettes, casemates, conning towers," etc. (Rec., p. 6.) This was to be done, as previously stated, "within the times and in the order required to carry on the work properly." But in case of the Government's failure to do this, it was expressly provided that the contractor might complete the vessel without the armor, and said vessel might be subjected to the trial provided for in the tenth clause of the contract, and if at the time all the conditions and requirements relating thereto, except as to the fitting, fixing, placing, and securing of the armor, shall be fulfilled, the vessel to be accepted as provided for in the eleventh clause of the contract. (Rec., p. 6.) It was further provided that, if the Government shall not have commenced the delivery of the armor when

the vessel is ready for her trial, or within five months after either a preliminary or a conditional acceptance of the vessel, the vessel shall be finally accepted subject to the conditions and requirements of the contract, and the cost of fitting, fixing, placing, and securing the armor shall be ascertained, estimated, and determined by a board of naval officers appointed by the Secretary of the Navy, and such cost shall be deducted from the price of the vessel in the final settlement under the contract.

The necessity for the clause in the contract for the trial of the vessel without the armor was recognized by both parties to the agreement, and the failure of the Government to deliver the armor was anticipated. It was well understood that this provision was entirely for the contractor's benefit. It was not in the interest of the Government to accept the ship without her armor, but the reasonableness of the provision was apparent in view of the fact that the armor-plate industry had not far progressed in the way of development and there was great uncertainty attending its manufacture. The appellant and the naval officials had difficulty in procuring armor in connection with other contracts of like character, all of which emphasized the element of uncertainty as to the delivery of the armor which the Government was necessitated to secure from others by independent contract. This was well known to the contractor at the time the contract was signed. Therefore, the provision for the trial of the vessel without the armor was reasonable and entirely in the interest of appellant. Upon the

failure of the Government to furnish the armor when the ship had arrived at that degree of construction where the armor was required, it was the privilege and duty of appellant under the contract to tender the vessel for trial, and upon such tender the Government was required to subject the vessel to trial as provided in the tenth clause of the contract.

This appellant did not do. At least there is not the slightest claim anywhere in the record that such tender was made. Had it been made, the period of delay would not have arisen, and it would seem that appellant should not now be heard to claim for a delay which was occasioned by its own negligence, inability, or indifference to act.

III.

Extension of the contract period.

In the ninth clause of the contract (Rec., pp. 9 and 10) three classes of delay are recognized and provided for therein, with different consequences attaching in the case of each: First, delays caused by circumstances within the contractor's control; that is, delays for which the contractor is alone responsible and for which penalties were imposed. Second, for delays attributable to neither party no penalties were imposed. These delays are described in the contract as caused "by fire or water, or by any strike or stand-out of workmen employed in the construction of the hull, machinery, fittings, or equipment of said vessel, or in the fitting, placing,

and securing of her armor, or by other circumstances beyond the control of the party of the first part" (the shipbuilder). Third, for delays attributable to the United States no monetary penalties were imposed, but the contractor was entitled to a corresponding extension of the period prescribed for the completion of the vessel. These are the delays described as caused "by any act of the party of the second part," and as "delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department or its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the vessel within the time specified therefor in this contract."

As to delays attributable to neither party, while the contractor might suffer serious loss, it could claim nothing from the Government on that account, and the provision that no deduction should be made from the contract price on account of such delays gave the contractor all the relief which it could fairly ask.

For delays attributable to the Government there could be no deductions from the contract price, and this even though it had not been so stated in the contract. The reason and justice of this are obvious; hence the provision for an extension of time was not necessary to protect the contractor against deductions on account of delay, and the only possible object was to relieve the Government from pecuniary liability for such delays.

The provisions of paragraph 3 relate to the Government's default in the delivery of armor, whereas the provisions of paragraph 9 of the contract cover all manner of delays which the Secretary of the Navy shall find chargeable to the Government. The conditions and circumstances which surrounded the contract were as well understood by the contractor as by the Government. The contractor well knew that the Government had no armor-plate plant of its own and had to obtain the same from outside parties, and that the question of armor plate at that time was a very uncertain quantity. It entered into the contract fully informed and advised and it can not now claim that the contract clause providing for an extension had any other, different, or larger effect than that stated therein. In other words, the contractor understood that in case of default on the part of the Government in the delivery of the armor no penalties could be claimed against the Government, but that an extension of the contract period would result, if requested; otherwise, the ship might be tendered and subjected to her trial and delivered without her armor, as provided for in the third paragraph of the contract.

It is submitted that where the contract provides a method to be pursued by either party in case of the other's default, that that method is an exclusive one, and the court will not add thereto or take therefrom. Had the contract been silent upon this point and failed to provide for such contingency there would

seem to be some basis for the appellant's contention and for the recovery prayed for.

As it is, the contractor, having invoked this provision of the contract and obtained the extension sought, thereby relieved itself from liability for deductions from the contract price due to its failure to deliver the vessel within the original contract period.

Applying the principle of the well-known maxim, *expressio unius est exclusio alterius*, the contractor is concluded by the terms of the contract itself. If such condition was unsatisfactory to the contractor it should have refused to execute the contract. As before suggested, this was not the first contract containing similar provisions entered into between the parties for the construction of a battle ship; no duress, fraud, or concealment entered into the negotiations; both parties were fully empowered to contract; both were fully conversant with all the details of the contract in question; and every known contingency was provided for therein, or intended to be provided for therein, and particularly delays attributable to the Government. Clearly the contractor having executed the contract is bound by its terms and can not add thereto clauses not contained therein, or escape the consequences of clauses embraced therein. The courts may not read into contracts new provisions, especially when the contract itself clearly provides for the contingency afterwards complained of.

The case of *Haydnville Mining and Manufacturing Co.* v. *Art Institute* (39 Fed. Rep., 184) is in point. This was an action to recover for extra work and

also for damage due to the delay of other contractors. The contract was for fireproofing work done on a building, work which would necessarily be delayed if the building was not ready for the fireproofing at the proper time. The contract contained this provision:

> Should delay be caused by other contractors to the positive hindrance of the contractor hereto, a just and proper amount of extra time shall be allowed by the architect, provided it shall have given written notice to said architect of such hindrance or delay.

In delivering its opinion in the case the court said:

> Taking this clause of the contract and the specifications together, I construe them to mean this: That, if the plaintiff was delayed by reason of the tardiness or want of dispatch on the part of the contractors doing other classes of work upon the building, it should be entitled to such further time for the completion of the work as the architects would allow him (sic.), but I do not see that there is any provision that it is entitled to pecuniary damages by reason of said delay. Evidently the parties anticipated that this contractor, doing only a part of the work, and that which was largely dependent upon the completion of other classes of work by other contractors, must await the movements of those other contractors, and it seems to me that the stipulation for further time to complete the work in case of delay by other contractors implies that there is to be no pecuniary compensation for such delay.

The only points of difference between the case cited and the case at bar are that in the former there were no penalties for delay by the contractor, and the extension of time was to be in case of delay by other contractors, but these differences, however, do not affect the principle involved in the two cases, which is the same.

The fact that in the Haydnville Company's case the time was to be extended on account of delays caused by other contractors does not impair the value of that case as a precedent. The point decided was that where a contract provides that in the event of delays caused by other contractors the time is to be extended the owner is not liable for damages caused by such delays; and it inevitably follows from the same reasoning that where a contract provides that in the event of delays caused by the owner or his agents the time is to be extended he is not liable for damages caused by such delays. The two cases are as analogous as two cases may well be, and the principle enunciated by the court is applicable here.

The case of *Richard* v. *Clark* (88 N. Y. Supp., 242) bears a still closer resemblance to the case at bar than that last cited in that delays for which the owner was responsible were provided for. The contract read:

> Should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay, or default of the owner or the architect, or of any other contractor employed by the owner upon the

> work, or by any damage which may happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employee through no fault of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid.

The architect was responsible for the delay, and the court below gave judgment in favor of the contractor for the damages due to such delay. The Supreme Court of New York, however, reversed the judgment and in the opinion rendered (p. 244 *Supra*) say:

> Nor am I satisfied that any damages in the case are recoverable either for a delay or for extra work. The claim for delay was necessarily based upon the failure of defendant's architects to furnish the detail plans in time, as to which the contract provided that if the contractor "be delayed in the prosecution or completion of his work by the act, neglect, delay, or default of the owner or the architect," etc., "then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid." The contract therefore explicitly contemplated a situation such as here has arisen, and the intention of the parties, as evidenced by the agreement, evidently was that the time clause affected the plaintiff alone, and that he might be absolved therefrom to the extent and in the manner provided in the contract.

The decision in the case cited would have been the same had the delay been caused by the owner instead of the architect, so that the case fits the case at bar like a death mask.

It will thus be seen that the contingency of delay, both in the delivering of the armor and in all other matters, was amply provided for in the contract. In case the armor should not be delivered when called for by the contractor and needed in the work, the option was his to finish the ship and deliver her without her armor, and in case of any other delay, or in case of delay in delivering the armor, the contractor was to have the right of an extension of his contract without incurring any penalties; so that the provisions of the contract being free from any possible ambiguity do not call for interpretation by the court, and, as explained above, being entirely reasonable and conscionable, do not call for reformation.

Presumably the contract says what it means and means what it says; otherwise it would not have been reduced to writing. The text of the same is its own best interpreter. Nothing is to be found in the language of the contract, and it is submitted that nothing is fairly deducible therefrom, giving the contractor damages for the Government's delays or defaults. It is only by a forced construction of its provisions and by supplying clauses not contained therein that any justification of the appellant's position is possible.

If nothing had been said concerning a breach of the contract on the part of the Government and no pro-

vision had been made therefor, the case would be on a different footing; but this very circumstance having been contemplated by the parties and having been covered by the contract in the first place, so that the contractor might complete and deliver the vessel without the armor, or, in the second place, that he might apply for and obtain an extension of the contract period, no shred of a case is left for recovery in damages on account of the Government's default.

It has been announced by this tribunal repeatedly and with emphasis that the courts will not assume to make a contract for the parties which they did not choose to make for themselves. This has not been more tersely stated than in the opinion of the court in the case of *Morgan County* v. *Allen* (103 U. S., 515), as delivered by Mr. Justice Harlan:

> We can only say, what can not be too often repeated, that hard cases can not be permitted to make bad law.

In the case of *Hudson Canal Co.* v. *Penna. Coal Co.* (8 Wall., 276), the court held:

> A covenant can not be implied in the absence of language tending to a conclusion that the covenant sought to be set up was intended. The fact that the nonimplication of it makes a contract, in consequence of events happening subsequent to its being made, quite unilateral to its advantages, is not a sufficient ground to imply a covenant which would tend to balance advantages thus preponderating.

In other words, it was held in that case that courts may not incorporate into a sealed instru-

ment any covenant for the expression of which language is entirely wanting in the instrument and which can not be legally implied from any other covenant therein, although the contract as expressed may seem to be much in favor of one party, and the omission of a covenant was clearly occasioned by mistake.

The court further said:

> Courts of law can not incorporate into a sealed instrument what the parties left out of it, even though the omission was occasioned by the clearest mistake; nor can they reject what the parties inserted, unless it be repugnant to some other part of the instrument.

In *Garinsel* v. *Krank* (22 Wall., 308) it was held that

> The court can not import words into a contract which would make it materially different in a vital particular from what it is.

A court of law can not incorporate into a sealed instrument that which is omitted, even by mistake, nor can anything be rejected unless clearly repugnant. (*Robbins* v. *Rollins*, 127 U. S., 633; *Culliford* v. *Gonillo*, 128 U. S., 158.)

The court is not at liberty either to disregard words used by the parties or to insert words which the parties have not made use of. (*Harrison* v. *Fortlage*, 161 U. S., 63.)

> The courts may not make a contract for the parties. Their function and their duty consist simply in enforcing one actually made. (*Imperial Fire Ins. Co.* v. *Coos County*, 151 U. S., 462.)

Where the language of a contract is clear and explicit there is no call for construction. (*Calderon* v. *Atlas Steamship Co.*, 170 U. S., 280.)

In the latter case the court in its opinion, *inter alia*, states as follows:

> Parties are presumed to know the force and effect of the language in which they have chosen to embody their contract, and to refuse to give effect to such language might result in artfully misleading others who have relied on the words being used in their ordinary sense. In construing contracts words are to receive their plain and literal meaning, even though the intention of the party drawing the contract may have been different from that expressed. (Citing Clark on Contracts, p. 593.)

Cases almost without number might be cited both in the federal and state courts holding that contracts are to be construed according to the intention of the parties as expressed therein, and that the courts will disregard the motives, the purposes, or the expectations of a party thereto if these are not in harmony with the plain import of the words used.

54 Texas, 65.
Clark v. *Lillie*, 34 Vt., 405.
Noyes v. *Nichols*, 28 Vt., 159.
Conn v. *Lewis*, 15 Ky., 66.
Hildreth v. *Forrest*, 27 Ky., 217.
Shultz v. *Johnson*, 44 Ky., 497.
Salmon Falls Mfg. Co. v. *Portsmouth Co.*, 46 N. H., 249.

The appellant's principal contention is that "The Government broke the contract and in consequence of that the claimant suffered damage, and is entitled to recover an amount equal to that damage." (Appellant's brief, p. 26.)

Counsel for the appellant in referring to paragraph 3 of the contract say:

> Certain contingencies provided against in the latter part of this paragraph, and which, had they arisen, might have modified the obligations of both parties, did not arise, so we can ignore them.

The fact is that these so-called "certain contingencies" did arise and have modified the obligations of both parties. It is specifically stated in said paragraph 3 that in case of the Government's failure so to do the contractor might complete the vessel, without her armor, and tender her for trial in such condition, and in case of further failure of the Government to deliver said armor within five months after either a preliminary or conditional acceptance of the vessel said vessel should be finally accepted by the Government. Therefore the paragraph of the contract providing for the delivery of the armor makes provision also for the default of the Government in this respect and gives the vessel company the right to complete the vessel without her armor and tender her to the Government.

Furthermore, under paragraph 9, in case of the Government's default the appellant might apply for

and secure an extension of the contract period corresponding with the time of the delay.

Appellant further says in this connection that—

> It was the builder's right and obviously it was for the best interests of the United States, as well as its own, to proceed with the work as best it could, complete it, and sue for damages caused by the breach.

It is true, as stated, that the builder had the right to proceed with the work and complete the vessel, notwithstanding the Government's breach; but provision having been made for the breach in lieu of damages the contractor can not recover damages caused by the breach.

In this view the authorities cited by appellant (appellant's brief, p. 26) are not in point. Quotation is made from Hudson on Building Contract (I, pp. 303–1907) to the effect that—

> If the prevention does not go to the root of the whole contract, but merely delays the performance, the contractor does not waive his right to recover damages merely by proceeding with the work.

As previously explained, the contractor in this case waives its right to recover the damage in the contract itself (not through any performance of the contract on appellant's part). Certainly it estops itself from the recovery of damage when it accepts the final payment and signs the release provided for by the contract.

The Government contends that upon its failure to furnish the armor plate as agreed an application might be made by the contractor for an extension corresponding to the time of delay, and that the extended contract period thereby becomes the real contract period; therefore there was no such delay as made the Government responsible to the contractor in damages.

This contention is characterized by appellant's counsel as "pure sophistry," and appellant says (p. 27 of its brief) that the Government might have deferred ordering the armor for years or forever, and if the Secretary kept on extending the Cramp company's building period the Government could have left the vessel on appellant's hands indefinitely and still have remained blameless.

It would seem that this argument is without force in view of the fact that appellant under its contract could tender the vessel without the armor. Again, it must be remembered that the Government at the time of entering into the contract for building this ship was in need of battle ships in view of the war with Spain, which was then imminent. In addition to this, the Government had a large sum of money already invested in this particular vessel, all of which contradicts the idea that the Government would indefinitely continue to extend the building period.

Appellant says (p. 32):

> It was competent to provide, as the contract did, that no damages should be imposed for

> delay occasioned without fault of the builder and beyond its control, whether the Government or some other agency were responsible. It was reasonable to discriminate, as the contract did, between delays due to the Government's fault and delays arising without fault of the Government or builder.

As previously explained, these contracts were unquestionably drawn with the idea in mind of protecting the Government against damages due to its failure to secure and deliver the armor "within the times and in the order to carry on the work properly."

The case of *Stubbings Co.* v. *Exposition Co.* (110 Ill. App., 210; appellant's brief, p. 33) is somewhat similar to the case at bar. However, it differs in this respect, that in the case cited the contract provided for the filing of claims for delays not attributable to the contractor, and stated when the same would be made and how they should be made. In other words, in that case damages were specifically provided for, thus clearly distinguishing it from the case at bar.

In the case of *Nelson* v. *Pickwick Co.* (30 Ill. App., 333, cited in appellant's brief, pp. 34 to 36, inclusive) there are also points of similarity presented to the case at bar. However, in that case there were other contractors on other parts of the work, and the contract provided that the appellant should cooperate with the contractors on other parts of the work and arrange matters so that none of the cooperating contractors should be delayed.

The court says (p. 334):

> These portions of the specifications were in print, and it is a reasonable inference that contractors for other branches of the work were bound by like provisions.

This differentiates the case cited from the case at bar, and, furthermore, it appeared in evidence that a promise was made by the general agent of the appellees having authority, to the appellant, when but a small part of the work was done and extra pay was claimed as a condition for going on with it, that the company would pay the additional cost caused by such delay.

It is impossible to determine how much influence the promise to pay for the extra time by the appellee at the time the delay occurred may have had upon the mind of the court in arriving at its conclusion.

Moreover, in the case cited, the court held that—

> The provision for the extra time was for the avoidance of the penalty the appellant would incur if he did not complete his contract on time.

In the present case the contract expressly provided that there should be no deductions for the delay due to circumstances beyond the contractor's control, so it is certain that the provision for extension was not for avoidance of penalty the contractor would incur if he failed to complete the work on time. This clearly distinguishes the cases.

There would seem to be a somewhat close resemblance between the case of *Del Genovese* v. *Third Ave. Ry. Co.* (13 N. Y. App., 412), cited in appellant's brief (p. 37), and the case at bar, although it is not clear that the two contracts are alike in all essential respects. Certainly in the contract construed by the court in the case cited it is not shown that there was any method provided for the contractor to finish the work despite the interruption of the other party or of other contractors. This is a vital variance between the two cases.

Taking into consideration the provisions of the contract in suit, which differ in many material respects from those contained in the cases cited by appellant in its brief, it is submitted that there is nothing which successfully controverts the position taken by the Government with respect to the contract herein. The rule of this case is laid down by Harmon in his work on contracts (p. 808, sec. 390), to the effect that where parties enter into engagements with express stipulations, it is to be presumed that they have expressed all the conditions by which they intend to be bound unless an intention to the contrary appears, and that where an agreement has been reduced to writing the parties will not be permitted to deny that they intended to make the stipulations contained in the instrument.

The cases of *Higgins* v. *Eagleton* (34 N. Y. Supp., 225) and *Aspen* v. *Austen* (5 Q. B. D., 671) are in point with the principle for which we contend,

holding, as appears in the opinion of the court in the last-mentioned case, that—

> Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend by any implication. The presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.

The contract for the building of this vessel provided that "when the conditions, covenants, and provisions of the contract are performed and fulfilled on the part of the party of the first part, then said party is entitled to receive the reserve or surplus of said reserve retained by the Government," on certain conditions, namely, "the execution of a final release to the party of the second part in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract." (Rec., p. 14.)

The release required by the contract was executed by appellant, wherein it "does hereby, for itself and its successors and assigns and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever in law and in equity, for or by reason of or on account of the construction of said vessel under the contract aforesaid, excepting the sum of twenty thousand dollars,

withheld by the Secretary of the Navy as above set forth." (Rec., pp. 27, 28.)

Every claim by this release on account of or growing out of the construction of the vessel in question, whether that claim be legal or equitable, was released by the execution of this instrument.

We respectfully submit that the Court of Claims was right in dismissing the petition, and we ask that its judgment be affirmed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

FRANKLIN W. COLLINS,
Attorney.

O

WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 92. Argued January 19, 20, 1910.—Decided February 28, 1910.

Executive officers are not authorized to entertain and settle claims for unliquidated damages.

The Secretary of the Navy had power under the acts of June 10, 1896, c. 361, 29 Stat. 378, authorizing the building of the "Alabama," and of August 3, 1886, c. 849, 24 Stat. 215, to make a change in the terms of the contract requiring a final release to be given so that such release should not include claims arising under the contract which he did not have jurisdiction to entertain, and under a proviso in the release to that effect the contractors are not barred from

prosecuting their claim before the Court of Claims for unliquidated damages.

In this case a provision in a government contract having been treated by both parties as impracticable and therefore waived, the Secretary had power to change the terms of the release required by the contract, and leave the claims of the contractor to be presented to the Court of Claims. *Cramp & Sons* v. *United States*, 206 U. S. 118, distinguished.

Under the Tucker Act the Court of Claims has jurisdiction of a claim for unliquidated damages under a contract for building a war vessel, where a release had been given by the Secretary of the Navy with a proviso that it does not include claims arising under the contract other than those of which the Secretary has jurisdiction. 43 C. Cl. 202, reversed.

THE facts are stated in the opinion.

Mr. James H. Hayden, with whom *Mr. Robert C. Hayden* was on the brief, for appellant:

The contract did not obligate the claimant to relinquish the claim in suit, or any other claims that might accrue to it for breach of the contract by the United States. The contract itself was not a release of such claims. The acceptance by the claimant of the last payment did not create a bar to the claimant's right of action for the breach committed by the United States.

Performance by the Government of its covenant to supply armor failing, the builder's agreement to release went with it. "If part of the consideration agreed on be not performed, the whole accord fails." *City of Memphis* v. *Brown*, 20 Wall. 289; *Bank* v. *Leech*, 94 Fed. Rep. 310; 1 Smith's Leading Cases, 5th Am. ed., 445.

The elaborate and tautological expressions contained in the fifth paragraph of the release do not overcome the particular words of limitation, contained in the proviso, which limited the operation of the release to claims which the Secretary of the Navy had jurisdiction to entertain. *Texas &c. R. Co.* v. *Dashiell*, 198 U. S. 521.

The Secretary of the Navy and the Cramp Company were correct in the opinion expressed by the former and acquiesced in by the latter that the claim being one for unliquidated damages is of a kind the Department has no authority under the law to entertain. By the saving clause which was finally included in the release they adopted apt words to carry out their purpose to leave the claim in suit open and unsettled. Executive officers of the Government cannot entertain such claims, even when they grow out of contracts made by them. Op. Atty. Gen., ed. 1841, 882. See also *McKee* v. *United States*, 12 C. Cl. 514, 555; *Power* v. *United States*, 18 C. Cl. 263, 275; *McClure* v. *United States*, 19 C. Cl. 18, 28; *Brannen* v. *United States*, 20 C. Cl. 219, 223; *Pneumatic Gun Carriage Co.* v. *United States*, 36 C. Cl. 627, 630.

To give the release or the claimant's acceptance of the last payments the effect claimed for them by the Government and given them by the court below, would be to use them in a way not justified by the terms of the release, or intended by the parties, and would allow the Government to commit a fraud. *Parmlee* v. *Lawrence*, 44 Illinois, 405, 409; *Fire Ins. Assn.* v. *Wickham*, 141 U. S. 564, 576, 582. If the terms of the release were obscure, which they are not, it would have to be interpreted in such a way as to carry out the intent of the parties, to be ascertained from the correspondence which passed between them. *United States* v. *Peck*, 102 U. S. 64; *Merriam* v. *United States*, 107 U. S. 437, 441; *United States* v. *Gibbons*, 109 U. S. 200, 203; *Chicago &c. R. Co.* v. *Denver &c. R. Co.*, 143 U. S. 596, 609; *Nash* v. *Towne*, 5 Wall. 689, 699.

The Secretary had legislative authority to make a contract for the construction of the vessel in question and while this was limited in some particulars it was broad. He was as free to exercise his judgment in the modification of the contract as to the release as he was to make the contract in the beginning. *United States* v. *Barlow*, 184 U. S. 123; *Solomon* v. *United States*, 19 Wall. 17; *Redfield* v. *Windom*, 137 U. S.

636. This case is not governed by *United States* v. *Wm. Cramp & Sons*, 206 U. S. 118, known as the "Indiana" case.

It was the builder's right and obviously it was for the best interest of the United States, as well as its own, to proceed with the work as best it could, complete it, and sue for damages caused by the breach. 2 Parsons on Contracts, 679; *Clark* v. *United States*, 6 Wall. 543; *United States* v. *Speed*, 8 Wall. 77; *United States* v. *Behan*, 110 U. S. 338, 344; *Figh* v. *United States*, 8 C. Cl. 319; *Myerle* v. *United States*, 33 C. Cl. 1; *Cornwall* v. *Henson*, 2 Ch. (1900) 298, 300; Hudson on Building Contracts, 1907, 303, 524; *Stubbings Co.* v. *Exposition Co.*, 110 Ill. App. 210; *Nelson* v. *Pickwick Co.*, 30 Ill. App. 333; *Del Genovese* v. *Third Ave. R. R. Co.*, 13 N. Y. App. Div. 412; *S. C.*, 162 N. Y. 614.

Mr. Assistant Attorney General John Q. Thompson and *Mr. Franklin W. Collins* for the United States:

The proviso is not sufficient to confer upon appellant right of recovery.

The failure of the delivery of the armor by the Government within the times and in the order required to carry on the work properly had been fully provided for in the contract in other ways, and had nothing whatever to do either as consideration or otherwise with the release which was required by the contract. While the contract itself may not be a release of such claims as those in suit, it nevertheless provided for a release of all claims growing out of the contract. *Texas &c. R. Co.* v. *Dashiell*, 198 U. S. 521.

While the Secretary of the Navy may have power to direct the modification of a contract during the progress of the work he has not after his discretionary powers have ceased and only a plain ministerial duty remains. The Secretary was clothed with authority to close the contract in a prescribed manner. He could not make the final payment until a full and final release of all claims was given by the contractor, neither could he modify or change the form of release

required by the contract, but this does not conflict with the exercise of his discretionary powers in respect to changes and modifications while the work was in progress.

The courts will not assume to make a contract for the parties which they did not choose to make for themselves. *Morgan County* v. *Allen*, 103 U. S. 515; *Hudson Canal Co.* v. *Penna. Coal Co.*, 8 Wall. 276; *Gavinzel* v. *Crump*, 22 Wall. 308; *Robbins* v. *Rollins*, 127 U. S. 633; *Culliford* v. *Gonillo*, 128 U. S. 158; nor is the court at liberty either to disregard words used by the parties or to insert words which the parties have not made use of. *Harrison* v. *Fortlage*, 161 U. S. 63; *Calderon* v. *Atlas Steamship Co.*, 170 U. S. 280.

Contracts are to be construed according to the intention of the parties as expressed therein, and the courts will disregard the motives, the purposes, or the expectations of a party thereto if these are not in harmony with the plain import of the words used. See 54 Texas, 65; *Clark* v. *Lillie*, 34 Vermont, 405; *Noyes* v. *Nichols*, 28 Vermont, 159; *Conn* v. *Lewis*, 15 Kentucky, 66; *Hildreth* v. *Forrest*, 27 Kentucky, 217; *Shultz* v. *Johnson*, 44 Kentucky, 497; *Salmon Falls Mfg. Co.* v. *Portsmouth Co.*, 46 N. H. 249.

Mr. Justice Brewer delivered the opinion of the court.

On September 24, 1896, the appellant entered into a contract with the United States for the building of an ironclad, afterwards known as the "Alabama." The contract was authorized by act of Congress of June 10, 1896, c. 399, 29 Stat. 361, 378. Under this act and that of August 3, 1886, c. 849, 24 Stat. 215, to which it refers, the Secretary of the Navy was charged with the duty of supervising the contract on behalf of the United States. After the completion of the vessel and the payment of the stipulated amount there was something asserted to be due to the building company as unliquidated damages on account of extra work caused by the United States, for which it brought suit in the Court of Claims. That

court found the amount to be $49,792.66. Relying upon the decision of this court in a case between the same parties for also the building of an ironclad, the "Indiana," *United States* v. *Wm. Cramp & Sons Co.*, 206 U. S. 118, the Court of Claims rendered judgment for the defendant. The controversy in this, as in the prior case, turns upon the effect of a release. In that it was in this form:

"The William Cramp and Sons Ship and Engine Building Company, represented by me, Charles H. Cramp, president of said corporation, does hereby for itself and its successors and assigns, and its legal representative, remise, release and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid."

Here the same terms of release are used, but they are followed by this proviso:

"Provided, that this release shall not be taken to include claims arising under the said contract other than those which the Secretary of the Navy had jurisdiction to entertain."

That release was executed on May 18, 1896; this on April 19, 1901. We held that the former release settled all disputes between the parties as to claims "under or by virtue" of the contract. Evidently the proviso was incorporated with the purpose of accomplishing some change in the effect of the release. That purpose is disclosed by prior correspondence. On February 13, 1901, the Secretary of the Navy, answering a letter enclosing a claim for extra work of $66,973.23, writes:

"I have to state that while, from a casual consideration of the matter, it might seem proper that the papers should be referred to the bureaus concerned for examination and report, it appears, after a careful consideration of the subject, that the claim, being for unliquidated damages, is of a kind the department has no authority under the law to entertain."

To which the company replied, suggesting this proviso:

"Provided, That nothing herein shall operate as a waiver of this company's right to sue for and recover judgment in the Court of Claims for damages incurred or losses sustained by the company in the prosecution of the contract work which were occasioned by delays or defaults on the part of the United States"—

and adding, in response to the statement of the Secretary, "that the claim being for unliquidated damages, is of a kind the department has no authority under the law to entertain;" that the act of March 3, 1887, c. 359, 24 Stat. 505, known as the "Tucker Act," vests the Court of Claims with jurisdiction to hear and determine such claims. Some further correspondence followed between the parties, which culminated in a letter from the company, enclosing the release as finally executed, and saying:

"This (release) contains a clause which excepts from the operation of the release claims arising under the contract, which you, as Secretary of the Navy, had not jurisdiction to entertain."

It is well understood that executive officers are not authorized to entertain and settle claims for unliquidated damages. Opinion of Attorney General Taney, in which he says:

"If the navy commissioners have refused to take the bread from Mr. Stiles, according to their contract, when he had prepared it of the quality called for by the agreement, it is not in the power of the executive branch of the Government to liquidate and pay the damages he may have sustained. If he has been damnified by the officers of the Government, Congress alone can redress the injury." (Opinions, ed. 1841, p. 882); *McKee* v. *United States*, 12 C. Cls. 504, 555–558.

In *Power* v. *United States*, 18 C. Cls. 263, 275, the court thus discussed the matter:

"The Secretary of the Interior concurred in the opinion that the claimant was equitably entitled to damages, and that he should be invited to furnish proof of the extent of his injury; but did not agree that the damages could be adjusted in

the department. He proposed to submit the case to Congress.

"In this conclusion that the department had no authority to settle such a claim the Secretary was right. The laws regulating the payment of money from the Treasury, in the current business of the Government, are reviewed at length by our brother Richardson in his opinion in *McKee's Case*, 12 Ct. Cl. R. 555. He shows clearly that the laws provide only for the settlement and payment of accounts. An account is something which may be adjusted and liquidated by an arithmetical computation. One set of Treasury officers examine and audit the accounts. Another set is entrusted with the power of reviewing that examination, and with the further power of determining whether the laws authorize the payment of the account when liquidated. But no law authorizes treasury officials to allow and pass in accounts a number not the result of arithmetical computation upon a subject within the operation of the mutual part of a contract.

"Claims for unliquidated damages require for their settlement the application of the qualities of judgment and discretion. They are frequently, perhaps generally, sustained by extraneous proof, having no relation to the subjects of the contract, which are common to both parties; as, for instance, proof concerning the number of horses and the number of wagons, and the length of time that would have been required in performing a given amount of transportation. The results to be reached in such cases can in no just sense be called an account, and are not committed by law to the control and decision of Treasury accounting officers.

"As is well said by Judge Richardson, in the opinion already referred to (12 C. Cls. 556), this construction 'would exclude claims for unliquidated damages, founded on neglect or breach of obligations or otherwise, and so, by the well-defined and accepted meaning of the word 'account' and the sense in which the same and the words 'accounting' and 'accounting officers' appear to be used in the numerous sections of the

numerous acts of Congress wherein they occur, it would seem that the accounting officers have no jurisdiction of such claims except in special and exceptional cases, in which it has been expressly conferred upon them by special or private acts. And such has been the opinion of five Attorneys General—all who have officially advised the executive officers on the subject. Attorney General Taney, in 1832, whose opinion is referred to by his successors in office; Attorney General Nelson in 1844 (4 Opins. 327); Attorney General Clifford in 1847 (4 Opins. 627); Attorney General Cushing in 1854 (6 Opins. 524); and Attorney General Williams in 1872 (14 Opins. 24). And the same views were expressed by this court in 1866 (*Carmack et al.* v. *United States*, 2 Ct. Cl. R. 126, 140.)' *McClure* v. *United States*, 19 *Id.* 28–29; *Brannen* v. *United States*, 20 *Id.* 219, 223–224; 4 Opin. Attorneys General, 327–328; *Id.* 626, 630."

But it is contended that the contract, independently of the release, provided for a settlement of all matters growing out of the delay in the completion of the vessel, although this is in apparent conflict with the opening statement of the Government in its brief, for there it says: "The issue here is whether the proviso in that release saves the contractor from the final and complete surrender of his right to recover on the claims set out in the petition." But this, although it indicates the views of the Government of the question at issue, does not preclude it from presenting other matters, and it insists that by the third clause in the contract, the vessel, when completed without the armor, was to be subjected to a trial provided for in a subsequent clause of the contract, and a board of naval officers appointed by the Secretary of the Navy was to determine the deduction from the total price of the vessel under the contract if completed with armor. It further contends that by the ninth clause of the contract the matter of possible delay was recognized by the Secretary of the Navy, and his determination as to the effect thereof was to be conclusive. Now it may be said that both the contractor and the Government had the right to insist upon the

delivery of the vessel when it was completed without the armor, and that the deduction in price should then be settled by the board of officers appointed by the Secretary. It may also be conceded that the Government could have insisted upon a release in the form specified in the contract, but neither the company nor the Government insisted on the delivery of the vessel at the time it was launched and before it was armored. The Government left the vessel with the company, waiting for armor to be put on—armor which it had not then been able to secure and tender to the company, and when the question arose as to a settlement it did not insist upon a release as specified in the contract. This contract was plainly treated by both parties as impracticable, and therefore waived. Evidently from his letter of February 13, 1901, the Secretary was of the opinion that, equitably, there was something due to the company, and yet, realizing that that question was not one for his determination, in order that full justice might be done, he consented to a change in the terms of the release, and this he had power to do. *Salomon* v. *United States*, 19 Wall. 17; *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636; *United States* v. *Barlow*, 184 U. S. 123, 135.

By the "Tucker Act" jurisdiction is conferred upon the Court of Claims "to hear and determine . . . all claims . . . for damages, liquidated or unliquidated, in cases not sounding in tort."

It results therefrom that a release executed in accordance with the terms of the contract would have extinguished all claims of the company against the United States growing out of the contract (206 U. S. 118); that the Secretary of the Navy had no power to pass upon and adjudicate claims for unliquidated damages; that he had power to accept a release such as was given, and that the proviso left for determination in the courts claims for unliquidated damages growing out of the contract; that under the Tucker Act the Court of Claims had jurisdiction to inquire into and determine claims for unliquidated damages, and that upon the facts found there

is due to the company from the United States for extra work caused by the United States the sum of $49,792.66.

The judgment of the Court of Claims is reversed and the case remanded to that court, with instructions to enter judgment for that amount.